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# SUING THE FEDERAL GOVERNMENT: CAN THE KING STILL DO NO WRONG?

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## I. INTRODUCTION

The Federal Tort Claims Act<sup>1</sup> (FTCA or Act) was enacted by Congress in 1946 as a waiver of federal sovereign immunity.<sup>2</sup> The waiver of immunity provision in the FTCA appears broad and sweeping at first glance: it provides that the United States "shall be liable [for tort claims] in the same manner and to the same extent as a private individual under like circumstances."<sup>3</sup> What Congress gave in one breath, however, it severely restricted in another. By its express terms, the Act exempts thirteen specific classes of tort claims from the waiver of immunity.<sup>4</sup> This

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1. Pub. L. No. 79-601, §§ 401-424, 60 Stat. 842 (1946) (codified as amended at 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-78, 2680 (1982)).

2. Prior to 1946, the United States government could not be sued in tort. The only relief available to those injured by governmental wrongs was through private relief bills in Congress. From the early twentieth century on, Congress found itself overwhelmed by thousands of private claim bills, and pressured by a growing number of courts, commentators, and legislators who criticized the unjust application of sovereign immunity to bar every claim alleging serious injury through governmental acts. See, e.g., Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924-25). In response to public criticism and the deluge of private relief bills, the U.S. House of Representatives in 1919 introduced a bill to waive sovereign immunity, with some limitations. See H.R. 14737, 65th Cong., 3d Sess. (1919). Congress considered a version of the bill in every session between 1919 and 1946, when the Act was finally passed. For a detailed discussion of the legislative history of the FTCA and its exceptions, see L. JAYSON, *HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES* §§ 51-64 (1988).

The version of the FTCA passed in 1946 shifted review of claims against the United States government to federal courts. In addition to establishing federal jurisdiction over such claims, the current version of the FTCA provides that the Government consents, with stated exceptions, to suits involving torts committed by government agents, officials, and employees. 28 U.S.C. §§ 1346(b), 2671-2680 (1982).

3. 28 U.S.C. § 2674 (1982).

4. Section 1346(b) does not apply to any claim:

- (a) based upon the exercise or performance of discretionary function by a federal agency or government employee;
- (b) arising out of postal negligence;
- (c) regarding tax collection or detention of goods by any law enforcement officer, including customs;
- (d) in admiralty for which a remedy is already provided;
- (e) arising during war and related to national defense;

Article examines how judicial expansion of the exceptions to the waiver of sovereign immunity has resulted in the dismissal of FTCA claims not intended by Congress to be barred.

This Article makes no attempt to describe each reservation of governmental immunity, and focuses instead on four situations in which the reserved sovereign immunity most frequently acts to bar suit:<sup>5</sup> (1) claims arising out of certain common law intentional torts;<sup>6</sup> (2) claims arising in a foreign country;<sup>7</sup> (3) suits by service members against the government where the injuries arise out of or in the course of activity incident to military service;<sup>8</sup> and (4) claims arising out of the exercise or performance of a discretionary function.<sup>9</sup>

After reviewing the judicial expansion of the legislated exceptions to the FTCA, and the creation by the Supreme Court of an additional exception not enumerated in the FTCA,<sup>10</sup> this Article suggests that courts have gone beyond the intent of Congress in reserving sovereign immunity to the federal government. The lack of clear definitions and consistent interpretation of the exceptions has resulted in both the dismissal of proper claims and conflicting opinions among lower courts. This Article concludes that courts should pay greater deference to congressional intent in interpreting the FTCA exceptions, should read those exceptions more narrowly, and should avoid judicial creation of new exceptions. Congressional guidance and amendment would help to clarify vague terms and limit judicial expansion of FTCA exceptions.

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(f) for damages caused by government quarantine;

(g) repealed;

(h) arising out of 11 enumerated intentional torts, except for several torts committed by "investigative or law enforcement officers" of the United States government;

(i) for damages caused by the fiscal operations of the Treasury or by regulation of the monetary system;

(j) arising out of military combatant activities during time of war;

(k) arising in a foreign country;

(l) arising from the activities of the Tennessee Valley Authority;

(m) arising from the activities of the Panama Canal Company; and

(n) arising from the activities of certain Federal banks.

(paraphrasing 28 U.S.C. § 2680 (1982)).

5. While this Article discusses each exception separately, the reader must consider that more than one exception may arise in the same suit. See, e.g., *United States v. Shearer*, 473 U.S. 52 (1985) (claim barred by both intentional tort exception and *Feres* doctrine); *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 1242 (E.D.N.Y.) (court considered *Feres* doctrine, foreign country exception, "combatant activities" exception and discretionary function exception), *appeal dismissed*, 745 F.2d 161 (2d Cir. 1984).
6. 28 U.S.C. § 2680(h) (1982).
7. *Id.* § 2680(k).
8. *Id.* § 2680(j). The scope of Section 2680(j) was expanded by the Supreme Court in *Feres v. United States*, 340 U.S. 135 (1950). The doctrine emanating from this decision is known as the *Feres* doctrine, which is further discussed *infra* at text and notes contained in Part IV.
9. 28 U.S.C. § 2680(a) (1982).
10. See *supra* note 8.

## II. CLAIMS ARISING OUT OF INTENTIONAL TORTS

The intentional tort exception to the waiver of sovereign immunity reserves to the government immunity for claims "arising out of" eleven intentional common law torts, including assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit and interference with contract rights.<sup>11</sup> Although the exception appears straightforward, inventive lawyers have found fertile ground for litigation in the "arising out of" language by framing claims in terms of the government's negligent breach of an affirmative duty to a plaintiff.<sup>12</sup> Inconsistent interpretations of the phrase "arising out of," and the lack of clear congressional intent in enacting the intentional tort exception,<sup>13</sup> have resulted in conflicting approaches by lower courts.<sup>14</sup>

In discussing the intentional tort exception, this Article focuses solely on cases involving the intentional torts of assault and battery. These cases, more than any others, give rise to claims in which a negligent breach of duty precedes the injurious intentional conduct.

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11. 28 U.S.C. § 2680(h) (1982). In 1974 Congress amended section 2680(h) to allow suits for assault, battery, false imprisonment, abuse of process and malicious prosecution arising out of the tortious acts or omissions of federal investigative or law enforcement officers. Act of March 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50. In enacting the 1974 amendment, which expanded governmental liability, Congress was responding to the apparent injustice in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See S. REP. NO. 588, 93d Cong., 2d Sess. 2, as cited in Note, *The Talismanic Language of Section 2680(h) of the Federal Tort Claims Act*, 60 TEMP. L.Q. 243, 254 (1987). In *Bivens*, federal narcotics agents conducting a criminal surveillance mistakenly raided the wrong private dwellings and terrorized the residents. The residents' only remedy was a private action against the agents. Congress amended section 2680(h) to create a cause of action against the federal government in such cases. See, e.g., *Celestine v. United States*, 841 F.2d 851, 852-53 (8th Cir. 1988) (Veterans' Administration security guard was a "law enforcement officer," and as such, claim of assault and battery was not barred under section 2680(h)); cf. *Jones v. Federal Bureau of Investigation*, 139 F. Supp. 38, 42-43 (D. Md. 1956) (pre-amendment case holding claim of assault and battery by FBI agents barred by section 2680(h)).
  12. See, e.g., *Doe v. Scott*, 652 F. Supp. 549, 552-53 (S.D.N.Y. 1987) (assault and battery exception of section 2680(h) does not bar suit against the federal government for negligence of federally employed child care workers where government's breach of duty to protect children in its care proximately caused children's injuries).
  13. The legislative history of section 2680(h) has been described as "sparse," *United States v. Shearer*, 473 U.S. 52, 55 (1985), and "meager," *Panella v. United States*, 216 F.2d 622, 625 (2d Cir. 1954).
  14. Compare *Thigpen v. United States*, 800 F.2d 393, 395-96 (4th Cir. 1986) (Section 2680(h) "draws no distinction for cases involving a 'affirmative duty' owed by government to plaintiffs") with *Doe v. United States*, 838 F.2d 220, 223 (7th Cir. 1988) ("Where the government affirmatively assumes a duty to the victim prior to the assault, and the government breaches that duty causing injury to the victim, we cannot say that her claim arises out of the assault. Rather, it rises out of the breach of that affirmative duty.").

A. *Historical Background of the Intentional Tort Exception: The Employee/Nonemployee Approach*

The legislative history of section 2680(h), sparse as it is, provides some support for allowing a claim when the negligence of the federal government results in an assault and battery. While there is little indication that Congress gave much thought to such claims, what discussion there was reflects that Congress never intended to bar claims for negligently caused assaults and batteries.<sup>15</sup>

The lack of clear congressional intent, however, led some courts to infer that Section 2680(h) barred any negligence claim related in any way to an assault or battery.<sup>16</sup> The Second Circuit, in response to the confusion surrounding the intended scope of the intentional tort exception, rejected this interpretation.<sup>17</sup> In *Panella v. United States*,<sup>18</sup> the court sug-

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15. The only discussion regarding claims of governmental negligence leading to assault and battery took place during the 1942 hearings before the House Judiciary Committee. In support of allowing such claims, Assistant Attorney General Francis M. Shea told committee members that an injury caused by governmental negligence which results in assault and battery would not be barred by the FTCA exception:

Mr. Robinson: On that point of deliberate assault that is where some agent of the government gets in a fight with some fellow: Mr. Shea: Yes.

Mr. Robinson: And socks him?

Mr. Shea: That is right.

Mr. Cravens: Assuming a C.C.C. automobile runs into a man and damages him then under the common law, where that still prevails, is not that considered an assault and is not the action based on assault and battery?

Mr. Shea: I should think not. I would think under the common law rather that would be trespass on the case.

Mr. Cravens: Trespass on the case? Mr. Shea: Yes.

Mr. Cravens: I do not remember these things very well, but it seems to me there are some cases predicated on assault and battery even though they were personal injury cases.

Mr. Shea: No; I think under the common law pleading you have the same writ, but it makes a distinction between an assault and negligence.

Mr. Cravens: This refers to a deliberate assault?

Mr. Shea: That is right.

Mr. Cravens: If he hit someone deliberately?

Mr. Shea: That is right.

Mr. Cravens: *Is it not intended to exclude negligent assaults?*

Mr. Shea: *No.* An injury caused by negligence could be considered under the bill.

*Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary, 77th Cong., 2d Sess. 33-34 (1942) (emphasis added) (quoted in Note, Section 2680(h) of the Federal Tort Claims Act: Government Liability for the Negligent Failure to Prevent an Assault and Battery by a Federal Employee, 69 GEO. L.J. 803, 809-810 (1981)) [hereinafter Note, Assault and Battery Exception].*

Interestingly, courts which have denied claims of governmental negligence which culminated in an assault have focused on the first part of Mr. Shea's exchange with the House Judiciary Committee, but have ignored the last two lines. See *United States v. Shearer*, 473 U.S. 52, 55 (1985); *Panella v. United States*, 216 F.2d 622, 626 (2d Cir. 1954).

16. See *Johnson v. United States*, 788 F.2d 845, 850 (2d Cir.), cert. denied, 479 U.S. 914 (1986); *Collins v. United States*, 259 F. Supp. 363, 364 (E.D. Pa. 1966).

17. *Panella v. United States*, 60 F.2d 622, 624 (2d Cir. 1954) ("In construing the lan-

gested that a negligence suit against the government be allowed when the underlying assault is committed by a non-government employee.<sup>19</sup> A suit to hold the government liable on a negligence theory for assaults committed by government employees, on the other hand, would be barred under Section 2680(h).<sup>20</sup>

In adopting the employee/nonemployee distinction, the court reasoned that a suit involving an assault by a government employee should be barred because the negligence claim would be "merely an alternative form of remedy" to the assault claim.<sup>21</sup> Implicit in the court's reasoning is the assumption that suits involving assaults by government employees are grounded in the doctrine of *respondeat superior*,<sup>22</sup> which holds an employer vicariously liable for the tortious acts of an employee committed within the scope of employment.<sup>23</sup> Further implicit in the court's reasoning is the belief that federal tort claims plaintiffs would circumvent the assault and battery exception by framing the complaint in negligence.<sup>24</sup> The court's analysis, however, ignores the reality that negligently caused assault and battery involves two separate tort claims—the first for the government's negligence in hiring, supervising or training its employee, and the second for the actual assault and battery. The government's negligence is a distinct and actionable tort claim, and not a back door attempt to avoid the intentional tort exception.<sup>25</sup>

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guage of the Act, we should, on the one hand, give full scope to the Government's relinquishment of its historic immunity from suit, and on the other hand, avoid narrowing the provisions which set forth situations in which Congress has seen fit to retain that immunity. Our object should be to read the Act so as to make it 'consistent and equitable'. . . . It is true that Section 2680(h), retaining immunity against claims arising out of assault and battery, can literally be read to apply to assaults committed by persons other than government employees. But we think such a construction out of keeping with the rest of the act.") (citing *Feres v. United States*, 340 U.S. 135, 139 (1949)).

18. 60 F.2d 622 (2d Cir. 1954). In *Panella*, an outpatient stabbed another patient at a federal mental hospital. The victim sued the government under the FTCA claiming that his injury was caused by the negligent failure of security guards to prevent the assault. The court, in an opinion written by then Judge Harlan, held that section 2680(h) did not bar a claim for a negligently caused assault committed by a non-government employee. *Id.*

19. *Id.* at 624-25.

20. *Id.* at 624. It should be noted that the *Panella* approach leads to incongruous and irrational results. It seems difficult to justify why the government should be held liable for negligently failing to prevent an assault by a non-government tortfeasor such as the patient in *Panella*, over whom the government has little or no control, and not liable under the same circumstances when the assault is committed by a government employee, over whom the government does exercise control.

21. *Id.*

22. See, e.g., *Naisbitt v. United States*, 611 F.2d 1350, 1356 (10th Cir.), *cert. denied*, 449 U.S. 885 (1980).

23. See generally W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS § 69, at 499 (5th ed. 1984) (employer liable for employee's acts under doctrine of respondeat superior).

24. See, e.g., *Johnson v. United States*, 788 F.2d 845, 851 (2d Cir.), *cert. denied*, 479 U.S. 914 (1986).

25. For a fuller discussion of the *Panella* court's flawed reasoning in adopting the em-

The employee/nonemployee distinction used in *Panella* and its progeny has been criticized by courts and commentators alike.<sup>26</sup> In some respects, the conflict surrounding the employee/nonemployee approach has shifted to a debate over how to determine when a claim "arises out of" an intentional tort.

*B. Definition of "Arising Out of" an Intentional Tort: Conflicting Approaches*

Judicial interpretation of the "arises out of" language of Section 2680(h) is conflicting.<sup>27</sup> Some courts interpret this language literally, dismissing any claim in which an assault or battery is a basis of liability.<sup>28</sup>

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ployee/nonemployee approach, see Note, *Assault and Battery Exception*, *supra* note 15, at 814-22 and accompanying notes.

26. See *Doe v. United States*, 838 F.2d 220, 222 (7th Cir. 1988) (rejecting the employee/nonemployee approach because "it cuts too rough a path and unnecessarily thwarts congressional intent"); *Bennett v. United States*, 803 F.2d 1502, 1504 (9th Cir. 1986) (rejecting approach that bases government liability on employee/nonemployee distinction because there is "nothing in the legislative history or in the language of the statute that evinces any congressional purpose to distinguish between supervised employees and supervised nonemployees"); *Thigpen v. United States*, 800 F.2d 393, 401 (4th Cir. 1986) ("It has been suggested that such cases can be distinguished on the ground that the assailant responsible for the actual assault and a battery was not a government employee. . . . The difficulty with such a distinction, however, is that the words 'arising out of assault [and] battery' in § 2680(h) must mean the same thing whether the assailant is a government employee or not"). See also Note, *The Talismanic Language of Section 2680(h)*, *supra* note 11, at 263 (calling for legislative amendment and judicial action to recognize that assault and battery is a separate tort and a logically distinct claim from negligent supervision, and as such, the intentional tort exception should not bar claims of negligent supervision). Note, *Assault and Battery Exception*, *supra* note 15, at 817-22 (summarizing pitfalls of the employee/nonemployee approach).

Supreme Court justices, regardless of whether they support a broad or narrow interpretation of the exception, also have rejected the employee/nonemployee distinction. In *Sheridan v. United States*, 108 S. Ct. 2449 (1988), Justice Stevens, writing for the plurality, asserted that "the mere fact that [an assailant] happens to be an off-duty federal employee should not provide a basis for protecting the government from liability. . . . [I]t would seem perverse to exonerate the government because of the happenstance that [the assailant] was on a federal payroll." *Id.* at 2455. Justice O'Connor, writing for the dissent, took the same position although calling for the opposite result: "This analysis [rejecting governmental liability where the individual tortfeasor is more culpable than the negligent government employee] applies whether the person committing the intentional tort is a government employee, a nonemployee, or a government employee acting outside the scope of his office." *Id.* at 2460 (O'Connor, J., dissenting).

27. Compare the plurality opinion in *United States v. Shearer*, 473 U.S. 52, 55 (1985) ("Section 2680(h) does not merely bar claims for assault and battery; in sweeping language it excludes any claim arising out of assault and battery. We read this provision to cover claims like respondent's that sound in negligence but stem from a battery committed by a government employee") (emphasis in original) with *Doe v. United States*, 838 F.2d 220, 223 (7th Cir. 1988) (rejecting government's assertion that any claim "tangentially related to an assault" is barred by section 2680(h) because "courts have long recognized that this language must be construed in light of the entire statute, to effect its purpose").
28. See *Thigpen v. United States*, 800 F.2d 393, 395 (4th Cir. 1986).

Other courts interpret the language broadly, barring claims for assault and battery, but permitting claims for negligent hiring, supervision or training of the intentional tortfeasor.<sup>29</sup>

In *Thigpen v. United States*,<sup>30</sup> suit was brought on behalf of two young girls who had been sexually molested by a Navy corpsman while they were convalescing from surgery in a military hospital. The suit asserted negligent supervision of the corpsman, who had previously pled guilty to a charge of indecency with a child. The government claimed immunity on the ground that the suit "arose out of" assaults or batteries. The Fourth Circuit held that the intentional tort exception to the waiver of sovereign immunity "erects a bar to all claims which rely on the existence of an assault or battery by a government employee," whether or not such conduct forms the sole basis for the claim.<sup>31</sup>

In a spirited concurring opinion, however, Judge Murnaghan argued that the claim did not "arise out of" an assault and battery since it was "based directly on the breach of a clear and recognizable affirmative duty, owed by the United States to the plaintiff, to protect the plaintiff from the harmful conduct of others."<sup>32</sup> Judge Murnaghan reasoned that

the category of claims "arising out of" assault and battery is properly limited to those where the liability of the United States would effectively be based on vicarious responsibility, through the doctrine of *respondeat superior*, for the violent act of another. A claim does not "arise out of" an assault and battery where it is based directly on the breach of a clear and recognizable affirmative duty, owed by the United States to the plaintiff, to protect the plaintiff from the harmful conduct of others.<sup>33</sup>

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29. See *Bennett v. United States*, 803 F.2d 1502, 1504 (9th Cir. 1986).

30. 800 F.2d 393 (4th Cir. 1986).

31. *Id.* at 394. The court found persuasive the Supreme Court's opinion in *United States v. Shearer*, 473 U.S. 52 (1985), that the plain language of section 2680(h) "does not merely bar claims for assault and battery; in sweeping language it excludes any claim arising out of assault or battery. . . . [Section 2680(h) covers] claims . . . that sound in negligence but stem from a battery committed by a Government employee." *Id.* at 55. In *Shearer*, four Justices found that section 2680(h) barred an FTCA claim where the Army's negligence caused the plaintiff's son to be murdered by another serviceman. Four other Justices held the claim barred by the *Feres* doctrine and declined to join Chief Justice Burger's opinion on the intentional tort exception. *Id.* at 59-60. Justice Powell did not participate in the decision. *Id.*

The *Thigpen* court reaffirmed the principle that "[t]he Federal Tort Claims Act . . . must be strictly construed in favor of the sovereign. Exceptions to such waivers, accordingly, receive a generous construction, with ambiguities resolved against those seeking recovery from the government." 800 F.2d at 394 (citation omitted). The court also found its prior decision in *Hughes v. United States*, 662 F.2d 219 (4th Cir. 1981) controlling in barring the claims. The court interpreted *Hughes* as establishing that section 2680(h) "not only covers actual claims for assault and battery, as its broad language indicated, [but it] also bars any claim that depends on the existence of an assault and battery." 800 F.2d at 395.

32. *Id.* at 398 (Murnaghan, J., concurring).

33. *Id.* Judge Murnaghan nevertheless concurred in the judgment of the court, reasoning that the case fell within the *Feres* doctrine, which provides that "the Govern-



Although Judge Murnaghan was unable to persuade his colleagues on the Fourth Circuit to limit the scope of the intentional tort exception, the Ninth Circuit adopted a position consistent with his analysis. In *Bennett v. United States*,<sup>34</sup> the court held that the intentional tort exception did not bar claims brought on behalf of children who had been sexually abused by a teacher, where the claimants could establish that the government was negligent in hiring the teacher and in permitting him to continue his employment.<sup>35</sup>

The *Bennett* court relied to a great extent on its prior holding in *Jablonski ex rel. Pahls v. United States*,<sup>36</sup> where it held the intentional tort exception inapplicable to claims for injuries sustained in assaults or batteries which occur as the result of negligent government supervision of nonemployees.<sup>37</sup> In extending its holding to include negligent supervision of employees, the Ninth Circuit perceived no reason why victims of government employees should be treated differently than victims of nonemployees.<sup>38</sup> Essentially, the court reasoned that it makes little sense to say that a negligence claim "arises out of" an assault when the perpetrator is a federal employee, but that the same claim does not "arise out of"

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ment is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of activity incident to service." See *Feres v. United States*, 340 U.S. 135, 146 (1950). The Supreme Court built upon the foundation of the *Feres* doctrine in *United States v. Shearer*, 473 U.S. 52 (1985), where it held that sovereign immunity of the federal government is not waived where the claims involve "sensitive military affairs at the expense of military discipline and effectiveness." *Id.* at 59.

34. 803 F.2d 1502 (9th Cir. 1986).

35. *Id.* at 1503. The teacher, who was employed at a Bureau of Indian Affairs boarding school, had admitted on his employment application that he had been charged with a sex offense for which there was still a bench warrant outstanding. The government never investigated the circumstances of the child molestation charge. The teacher was hired and placed in an Arizona school, where he kidnapped, assaulted, and raped several schoolchildren while off-duty. *Id.* at 1502-03.

36. 712 F.2d 391 (9th Cir. 1983).

37. See *Bennett*, 803 F.2d at 1503 (citing *Jablonski ex rel. Pahls v. United States*, 712 F.2d 391, 395 (9th Cir. 1983) (government responsible for failure to protect patient at Veterans' Administration hospital from psychiatric patient with known criminal history)); see also *Gibson v. United States*, 457 F.2d 1391, 1395 (3d Cir. 1972) (government responsible for failure to protect Job Corps instructor from enrollee known to be juvenile delinquent and drug addict); *Rogers v. United States*, 397 F.2d 12, 15 (4th Cir. 1968) (government responsible where probationer alleged that negligence by U.S. marshall allowed non-government employee with "unsavory reputation" to assault and torture probationer).

38. *Bennett*, 803 F.2d at 1504. The court noted that distinguishing between employees and nonemployees results in a broad grant of immunity inconsistent with the FTCA's purpose of providing a forum for those injured by the government's negligence. *Id.* The court noted further that

[t]o construe the assault and battery exception to defeat claims based on negligence when the negligence amounts to almost reckless disregard in the hiring and the placement of a known sex offender in charge of children would violate 28 U.S.C. § 2674 (1982) by treating the federal government differently from private entities hiring and supervising teachers.

*Bennett*, 803 F.2d at 1504.

an assault when the perpetrator is a nonemployee.<sup>39</sup> In either case, the court explained, the appropriate focus is not on the status or conduct of the perpetrator, but on the negligence of the government in failing to supervise him, and claims arising from the latter do not "arise out of" assaults and batteries.<sup>40</sup>

The opposite conclusions reached by the courts in *Thigpen* and *Bennett* reflect two conflicting approaches to the intentional tort exception.<sup>41</sup> One approach permits recovery for injuries sustained in an assault or battery at the hands of a government employee, provided the *theory* of liability is premised upon negligent hiring, supervision or training.<sup>42</sup> The second school of thought rejects liability in any case in which assault or battery by a government employee is essential to the claim.<sup>43</sup>

The conflict between these two approaches was recently discussed

39. *Id.*

40. *Id.*

41. There is, however, a consensus within the Supreme Court and accord among the circuits that the intentional tort exception does not bar claims "arising out of" assaults and batteries by nonemployees. See *United States v. Shearer*, 473 U.S. 52, 56 (1985); *Doe v. United States*, 838 F.2d 220, 221 (7th Cir. 1988); *Wine v. United States*, 705 F.2d 366, 367 (10th Cir. 1983); *Panella v. United States*, 216 F.2d 622, 626 (2d Cir. 1954) (Harlan, J.).

In claims of negligent supervision of nonemployees, the claim against the government is based solely on its negligence. The absence of an employment relationship removes the concern that a plaintiff could disguise a respondeat superior claim as a "negligent supervision" claim. *Doe v. United States*, 838 F.2d 220, 223 (7th Cir. 1988). But see *Sheridan v. United States*, 108 S. Ct. 2449, 2460 (1988) (O'Connor, J. dissenting) (rationale and intent of Congress to bar claims arising from intentional torts because individual tortfeasor is more culpable applies regardless of whether tortfeasor is government employee, nonemployee or government employee acting outside the scope of employment).

42. See, e.g., *Bennett v. United States*, 803 F.2d 1502, 1503 (9th Cir. 1986); *Doe*, 838 F.2d at 223 (Section 2680(h) does not bar claim based on negligence in allowing unknown assailants to sexually molest children at Air Force day care center, where government affirmatively assumed duty to victims prior to assault, and government's subsequent breach of duty caused victim's injury); *Kearney v. United States*, 815 F.2d 535, 536 (9th Cir. 1987) (Section 2680(h) does not bar claim of negligent supervision resulting in sexual assault and murder by serviceman); *Rogers v. United States*, 397 F.2d 12, 15 (4th Cir. 1968) (Section 2680(h) does not bar claim based on negligence by United States marshal in allowing non-government employee to assault and torture probationer); see also *supra* notes 34-40 and accompanying text.

43. See *Thigpen v. United States*, 800 F.2d 393, 394 (4th Cir. 1986); *Johnson v. United States*, 788 F.2d 845, 852 (2d Cir.) (Section 2680(h) bars claim based on negligent supervision of postal worker who sexually assaulted child), *cert. denied*, 479 U.S. 914 (1986); *Satterfield v. United States*, 788 F.2d 395, 399-400 (6th Cir. 1986) (Section 2680(h) bars claim of negligent supervision and failure to warn resulting in death of serviceman by three fellow servicemen); *Garcia v. United States*, 776 F.2d 116, 118 (5th Cir. 1985) (Section 2680(h) bars claim based on negligent supervision of military recruiter who sexually assaulted a potential recruit); *Wine v. United States*, 705 F.2d 366, 367 (10th Cir. 1983) (Section 2680(h) bars claim based on negligent supervision of off-duty serviceman who shot and sexually assaulted plaintiff); *Hughes v. United States*, 662 F.2d 219, 220 (4th Cir. 1981) (Section 2680(h) bars claim based on negligent retention of postal worker who sexually assaulted two young girls); see also *supra* notes 30-33 and accompanying text.

but not resolved by the Supreme Court in *Sheridan v. United States*.<sup>44</sup> *Sheridan* involved a claim against the government arising from an assault by an enlisted off-duty medical aide. The aide had become intoxicated and was found unconscious by three Navy corpsmen. The corpsmen picked the aide up with the intention of taking him to a local emergency room. The corpsmen fled, however, when the aide regained consciousness, grabbed a rifle and displayed its barrel. They took no further action to subdue the aide or to notify the proper authorities. Thereafter, the aide left the building and began shooting at passing cars, hitting the plaintiffs' vehicle and causing the plaintiff's injuries.<sup>45</sup>

A claim for negligent failure to control the aide was brought against the government. In reversing the decisions of the trial court and the Fourth Circuit in favor of the government,<sup>46</sup> the Supreme Court found it unnecessary to adopt the view that any claim which asserts negligence as a basis for liability independent of assault should survive the intentional tort exception.

Noting that the FTCA waives governmental immunity for negligent or wrongful acts of a government employee "acting within the scope of his office or employment,"<sup>47</sup> the Court held that the aide's off-duty conduct was not within the scope of his employment and thus, could not by itself give rise to governmental liability under the FTCA.<sup>48</sup> Because the off-duty conduct of the aide did not involve governmental liability under the FTCA, the intentional tort exception was inapplicable. The basis for the claim allowed by the Court was not the conduct of the aide, but instead, the independent negligent failure of the three corpsmen to control the aide.<sup>49</sup>

The impact of the *Sheridan* decision on the intentional tort exception remains unclear. Read broadly, the case appears to dictate that the government may be held liable for the negligent supervision of a govern-

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44. 108 S. Ct. 2449.

45. *Id.* at 2451.

46. Both the Maryland District Court and the Fourth Circuit found the Fourth Circuit's prior decisions in *Hughes* and *Thigpen* applicable in barring the plaintiffs' claims. The Fourth Circuit held that the mere fact of government employment required dismissal. *Sheridan v. United States*, 823 F.2d 820, 822 (4th Cir. 1987), *rev'd*, 108 S. Ct. 2449 (1988).

In a perceptive dissent, Chief Judge Winter argued that where, as here, "government liability is independent of the assailant's employment status," the independent tort of negligence does not "arise out of" the intentional tort of assault and battery. *Sheridan*, 823 F.2d at 824 (Winter, J., dissenting).

47. *Sheridan*, 108 S. Ct. at 2455 (quoting *Panella v. United States*, 216 F.2d 622, 623 (2d Cir. 1954)).

48. *Id.*

49. *Id.* This theory of liability emerged because of the Government's having voluntarily prohibited possession of firearms on the naval base and voluntarily undertaking responsibility for care of persons "visibly drunk and visibly armed," which in the Court's view, amounted to a Good Samaritan responsibility distinct from the employment relationship. *Id.* (citing *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955)).

ment employee who assaults another unless the assault occurs within the scope of government employment. Because few cases have involved assaults which truly have occurred within the scope of the wrongdoer's office or employment, a broad interpretation of *Sheridan* would virtually nullify the intentional tort exception and would make it unnecessary to resolve the conflict raised by *Thigpen* and *Bennett*. Conversely, if *Sheridan* is confined to its facts, it may be interpreted to permit only negligent supervision claims arising out of assaults by off-duty personnel and would leave unsettled the conflict raised by *Thigpen* and *Bennett*.<sup>50</sup>

C. *Future Expansion of the Intentional Tort Exception: Negligent Supervision as an Independent Basis for Liability.*

Insight into future Supreme Court treatment of the intentional tort exception may be found in the concurring and dissenting opinions in *Sheridan*. Three members of the Court—Justices Rehnquist, O'Connor, and Scalia—dissented and would have held that where recovery is based upon injuries “associated in any way” with an assault and battery, the action “arises out of” that tort and is therefore barred.<sup>51</sup>

Justice Kennedy concurred in the judgment but faulted the Court's analysis.<sup>52</sup> In his view, application of the intentional tort exception should turn on whether the alleged negligence involved breach of a duty arising out of the employment relationship or breach of some separate duty independent of the employment relationship. If the breach arises out of the employment relationship, he concludes the claim should be barred. To hold otherwise, according to Justice Kennedy, “would frustrate the purposes of the exception”<sup>53</sup> since most intentional torts by government employees “plausibly could be ascribed to the negligence of the tortfeasor's supervisors.”<sup>54</sup> Conversely, Justice Kennedy would allow claims which allege negligence on the part of government personnel provided the negligence is independent of the employment relationship.

In *Sheridan*, a legitimate theory of liability existed independent of the assailant's employment status. The theory of liability did not turn on the fact that the assailant was a government employee, and would have been equally sound had he been a patient or a visitor. In Justice Kennedy's view, this distinction dictated a different result and he therefore concurred in the judgment of the majority.<sup>55</sup> The Court's focus in *Sheridan* on a separate and independent basis for liability should be expanded to include such claims as negligent supervision.

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50. Under either reading, however, it is clear the Supreme Court has rejected the employee-nonemployee distinction lower courts have relied on in dismissing claims under the intentional tort exception. See *supra* note 26 and accompanying text.

51. *Sheridan*, 108 S. Ct. at 2458-60 (O'Connor, J., dissenting).

52. *Id.* at 2458 (Kennedy, J., concurring). Justice Kennedy agreed with Judge Winter's dissent in *Sheridan*, 823 F.2d at 823-29. See also *supra* note 46.

53. 108 S. Ct. at 2458.

54. *Id.*

55. *Id.*

#### D. Conclusion

The parameters of the intentional tort exception are not yet fully defined. The diversity of opinion on the Supreme Court as to its proper scope creates future uncertainty. Nevertheless, *Sheridan* provides claimants with hope for avoiding the intentional tort exception in future cases.

### III. CLAIMS ARISING IN A FOREIGN COUNTRY

Congress has reserved to the federal government sovereign immunity for claims "arising in a foreign country."<sup>56</sup> Absent clear congressional definition of the terms used in this statutory exception, however, courts not only have experienced difficulty determining whether a claim "arises" in a foreign country, but have interpreted the term "foreign country" broadly to include American military bases,<sup>57</sup> American embassies,<sup>58</sup> areas leased to the United States,<sup>59</sup> land occupied or conquered by the United States during wartime,<sup>60</sup> and any territory outside the geographic boundaries<sup>61</sup> or political control of the United States.<sup>62</sup> Judicial expansion of the foreign country exception has established jurisdictional limits far greater than intended by Congress, thus resulting in the dismissal of valid claims contrary to the purposes and policies of the FTCA.<sup>63</sup>

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56. 28 U.S.C. § 2680(k) (1982) ("The provisions of [the Federal Tort Claims Act] shall not apply to . . . [a]ny claim arising in a foreign country.").

57. See *Eaglin v. United States*, 794 F.2d 981, 984 (5th Cir. 1986) (claim arose in Germany because plaintiff's slip and fall claim arose on American military base in Germany); see also *infra* notes 104, 107-110 and accompanying text.

58. See *Meredith v. United States*, 330 F.2d 9, 10 (9th Cir.) (although words "foreign country" are not words of art carrying a fixed and precise meaning in every context, common sense dictates that an American embassy on foreign soil is a foreign country), *cert. denied*, 379 U.S. 867 (1964); see also *infra* note 103 and accompanying text.

59. See *United States v. Spelar*, 338 U.S. 217, 219 (1949) (injury sustained on Newfoundland airfield leased to United States arose in foreign country); see also *infra* notes 89-100.

60. See *Cobb v. United States*, 191 F.2d 604, 608 (9th Cir. 1951) (Okinawa considered a foreign country notwithstanding United States sovereignty during World War II); see also *infra* notes 80-87, 102 and accompanying text.

61. See *Bell v. United States*, 31 F.R.D. 32, 35 (D. Kan. 1962) (foreign country means all countries other than those within boundaries of United States, its territories and possessions).

62. See *Beattie v. United States*, 756 F.2d 91 (D.C. Cir. 1985) (Antarctica not foreign country under plain meaning of FTCA because neither United States nor any other foreign nation asserts sovereignty over it); *Pignataro v. United States*, 172 F. Supp. 151, 152 (C.D.N.Y. 1959) (foreign country is any territory subject to the sovereignty of another nation); *Brunell v. United States*, 77 F. Supp. 68, 72 (S.D.N.Y. 1948) (foreign country is any area not a "component part or political subdivision of the United States"); *Straneri v. United States*, 77 F. Supp. 340, 341 (E.D. Pa. 1948) (foreign country means anywhere the United States Congress is not the "supreme legislative body").

63. See, e.g., *Eaglin v. United States*, 794 F.2d 981, 984 (5th Cir. 1986) (court lacked jurisdiction over claim arising from a slip and fall at United States Army base in West Germany); *Broadnax v. United States*, 710 F.2d 865, 867 (D.C. Cir. 1983) (district court lacked jurisdiction over complaint alleging medical malpractice by

The United States Supreme Court decision in *United States v. Spelar*<sup>64</sup> is the only case in which the Supreme Court has addressed the foreign country exception since the FTCA's enactment in 1946. Since *Spelar*, however, lower courts have attempted to reach results consistent with the narrow outcome of *Spelar* without regard to the broader purposes and policies of the FTCA and its exceptions.

This section of the Article analyzes various lower court decisions interpreting the phrase "arising in a foreign country" and suggests that the most logical definition of the phrase "foreign country" is an area where United States law could not be applied.<sup>65</sup> In those places where United States law could be applied, such as American military bases or embassies, the foreign country exception should be narrowly construed to allow suits to proceed.

#### A. *Historical Background of the Foreign Country Exception*

The FTCA and its exceptions were the product of numerous drafts and continuous debate for over twenty-seven years prior to its enactment in 1946.<sup>66</sup> A 1940 Senate Judiciary Committee version of the bill would have limited the FTCA to "damages or injuries occurring within the geographic limits of the United States, Alaska, Hawaii, Puerto Rico, and the Canal Zone."<sup>67</sup> The same year, the House Judiciary Committee considered a draft limiting claims to those "arising in the United States or its territories."<sup>68</sup> Two years later, a draft before the House Judiciary Committee exempted all claims "arising in a foreign country in behalf of an alien."<sup>69</sup> Because the language of the 1942 draft would have "made the waiver of the government's traditional immunity turn upon the fortuitous circumstances of the injured party's citizenship,"<sup>70</sup> the phrase "in

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United States Army doctors at Army hospital in Germany); *Gerritson v. Vance*, 488 F. Supp. 267, 268 (D. Mass. 1980) (court lacked jurisdiction to review a claim arising from accident occurring on grounds of United States embassy in Zambia).

64. 338 U.S. 217 (1949).

65. For other proposed definitions of the phrase "foreign country," see Bederman, *Exploring the Foreign Country Exception: Federal Tort Claims in Antarctica*, 21 VAND. J. TRANSNAT'L L. 731, 733 (1988) (the "only sensible definition of [foreign country] is one that emphasizes the presence or absence of another nation's tort law which effectively governs the claim") [hereinafter Bederman, *Foreign Country Exception in Antarctica*]; see also Comment, *The Foreign Country Exception to the Federal Tort Claims Act*, 22 LOY. L.A.L. REV. 603, 629 (1989) (the foreign country exception should be narrowly construed to prohibit cases arising under foreign law, rather than prohibiting those that arise in a foreign country in a strictly geographical sense) [hereinafter Comment, *FTCA Foreign Country Exception*].

66. See *United States v. Spelar*, 338 U.S. 217, 219-20 (1949) (FTCA was "the product of some 28 years of congressional drafting and redrafting, amendment and counter-amendment").

67. See *Tort Claims Against the U.S.: Hearings on S. 2690 Before the Senate Comm. on the Judiciary*, 76 Cong., 3d Sess. 38, 65 (1940).

68. See *Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Judiciary Comm.*, 76th Cong., 3d Sess. 3 (1940).

69. H.R. REP. NO. 5373, 77th Cong., 2d Sess. § 303(12) (1942).

70. *Spelar*, 338 U.S. at 220.

behalf of an alien" was removed in a revised version of the bill at the request of the Attorney General.<sup>71</sup> The enacted version, like the current version, merely contained the phrase "arising in a foreign country."

The Supreme Court, in *United States v. Spelar*,<sup>72</sup> recognized that the legislative history of the foreign country exception demonstrates that, although "Congress was ready to lay aside a great portion of the sovereign's ancient and unquestioned immunity from suit, it was unwilling to subject the United States to liabilities depending upon the laws of a foreign power."<sup>73</sup> The Court determined that the congressional purpose in reserving governmental immunity from suits arising in foreign countries was to protect the United States from being subject to the laws of another nation.<sup>74</sup> Accordingly, the Court correlated the coverage of the Act with the scope of United States sovereignty.

Although the legislative history, and the Supreme Court's interpretation of the foreign country exception in *Spelar*, make clear that Congress sought to protect the United States from liability arising from the laws of foreign powers, the legislative history fails to reveal a precise definition of the term "foreign country." In fact, Congress rejected earlier proposals to limit the scope of the FTCA to specific geographic areas such as the United States or its territories.<sup>75</sup> In rejecting these proposals, Congress instead adopted language designed to prevent the United States from being judged by the laws of a foreign country. Unfortunately, Congress did not define "foreign country" in carving out the exception, and the Supreme Court has relied on the amorphous concept of "sovereignty" in defining the exception's scope.<sup>76</sup>

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71. See *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 29, 35, 66 (1942). In support of dropping the phrase "in behalf of an alien," Assistant Attorney General Francis M. Shea told members of the House Judiciary Committee that

[c]laims arising in a foreign country have been exempted from this bill . . . whether or not the claimant is an alien. Since liability is to be determined by the law of the situs of the wrongful act or omission it is wise to restrict the bill to claims arising in this country. This seems desirable because the law of the particular State is being applied. Otherwise, it will lead I think a good deal of difficulty.

*Id.* at 35 (quoted in *Spelar*, 338 U.S. at 221).

72. 338 U.S. 217 (1949).

73. *Id.* at 221.

74. *Id.*

75. See *supra* notes 67-68 and accompanying text.

76. See *Spelar*, 338 U.S. at 223-24 (Frankfurter, J., concurring). Justice Frankfurter noted:

To assume that terms like "foreign country" and "possessions" are self-defining, not at all involving a choice of judicial judgment, is mechanical jurisprudence at its best. These terms do not have fixed and inclusive meanings. . . . Both [terms] have penumbral meanings. . . .

In the entangling relationships between . . . nations . . . it is not compelling that "foreign country" means today what it may have meant in the days of Chief Justice Marshall, or even in those of Mr. Justice Brown. The very concept of "sovereignty" is in a state of more or less solution these days. To find a single and undeviating content for "foreign country" . . . fails to

The lack of a clear definition of foreign country has left lower courts scrambling to apply the foreign country exception where the United States potentially *could* be exposed to the laws of foreign countries, rather than limiting the applicability of the foreign country exception to those cases where the United States *would* be exposed to the laws of a foreign country. Congressional waiver of sovereign immunity under the FTCA was the result of widespread awareness that, with limited exceptions, governmental immunity was not warranted either "as a matter of principle or as a matter of justice."<sup>77</sup> By mechanically applying the foreign country exception to bar valid claims, courts have not shown an awareness of "justice."<sup>78</sup> Rather, they have invoked the exception as a blanket refusal to consider FTCA claims even in the face of rapidly changing concepts of sovereignty, international relations, and international law.

### B. Definition of "Foreign Country"

Prior to the Supreme Court's decision in *United States v. Spelar*,<sup>79</sup> lower courts sought to define "foreign country" broadly in order to achieve the stated congressional policy of reducing the United States government's exposure to suits in foreign countries. For example, in *Straneri v. United States*,<sup>80</sup> a federal district court held that a foreign country was anywhere the United States Congress was not the "supreme legislative body."<sup>81</sup> Thus, to recover under the FTCA, "the tort must have been committed on lands within the boundaries of the United States or its territories or possessions."<sup>82</sup> The *Straneri* court rejected a claim made by a merchant seaman who had been struck by a vehicle driven by a United States serviceman in Belgium, a country occupied by the United States Army at the time of the accident. The court reasoned that, because Congress did not have full power to enact laws under which Belgium and its people would be governed, Belgium was a foreign

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recognize the scope of supple words that are the raw materials of legislation and adjudication and is unmindful of those considerations of policy which underlie, consciously or unconsciously, seemingly variant decisions.

*Id.*

77. H.R. REP. NO. 2428, 76 Cong., 3d Sess. 2, 8 (1940).

78. For a discussion of the judicial deviation from the concepts of "justice" and "fair play" in deciding cases under the foreign country exception, see Comment, *FTCA Foreign Country Exception*, *supra* note 65, at 622-24.

79. 338 U.S. 217 (1949).

80. 77 F. Supp. 240 (E.D. Pa. 1948).

81. *Id.* at 241.

82. *Id.* The Court specified that, regardless of the degree of control exercised by the United States government, all lands other than the 48 States, the District of Columbia, federal Indian reservations, Alaska, Hawaii, Puerto Rico, the Virgin Islands, the Canal Zone, Guam, Samoa and other Pacific Island possessions, are to be considered foreign countries for the purposes of the FTCA. *Id.* at 241 n.3. Interestingly, this definition is almost identical to the one contained in an earlier draft of the Act which was rejected by Congress. See *supra* notes 67-68 and accompanying text.



country.<sup>83</sup>

Similarly, in *Brunell v. United States*,<sup>84</sup> a USO entertainer was injured in Saipan while being transported in an Army jeep operated by a member of the United States Army. At the time of the accident, Saipan was in the possession and under the military control of the United States. Despite United States control of Saipan at the time, and the fact that Saipan was later made a trustee of the United States, the court "reluctantly"<sup>85</sup> concluded that Saipan was a foreign country within the provisions of the FTCA.<sup>86</sup> The court reasoned that Congress intended the FTCA to apply only to those "areas which were actually a component part or political subdivision of the United States."<sup>87</sup>

These two cases exemplify the overbroad definition of foreign country applied by courts in their resolve to achieve the congressional policy of avoiding the exposure of the United States to foreign laws. The *Straneri* and *Brunell* courts, however, adopted definitions of "foreign country" which Congress had explicitly rejected in revising the FTCA in 1946.<sup>88</sup>

Similarly, in *United States v. Spelar*,<sup>89</sup> the Supreme Court enunciated an overbroad definition of foreign country based on the equally vague term "sovereignty," as that concept was understood in 1949. In *Spelar*, a flight engineer employed by American Overseas Airlines was killed in a takeoff crash at Harmon Field, Newfoundland. The airfield was one of several leased for ninety-nine years to the United States by Great Britain. Spelar's estate sued the United States under the FTCA alleging that the fatal crash was caused by the government's negligent operation of the airfield.<sup>90</sup> The district court held the claim to be one "arising in a foreign country," and dismissed the complaint for lack of jurisdiction. The Second Circuit reversed, holding that the foreign country exception did not bar a suit for wrongful death at an air base under long-term lease to the United States.<sup>91</sup> The Supreme Court granted certiorari and held that the claim was barred by the foreign country

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83. *Straneri*, 77 F. Supp. at 241.

84. 77 F. Supp. 68 (S.D.N.Y. 1948).

85. *Id.* Other courts, while sympathizing with the plaintiff's plight, likewise have held that other FTCA exceptions barred a plaintiff's suit. See, e.g., *Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982) (applying the *Feres* doctrine, "reluctantly," and "regret[ting] the effects" of the application).

86. *Brunell v. United States*, 77 F. Supp. 68, 72 (S.D.N.Y. 1948). The court noted that, although foreign territory occupied by United States armed forces comes under the sovereignty of the United States, it does not in fact become part of the United States. *Id.* at 71. Thus, as under relevant revenue laws, neither military occupation nor cessation by treaty makes a conquered territory domestic territory, so long as Congress has not incorporated the territory into the United States. *Id.*

87. *Id.* at 72.

88. See *supra* notes 67-68 and accompanying text.

89. 338 U.S. 217 (1949).

90. *Id.* at 218.

91. *Id.* at 219.

exception.<sup>92</sup>

In barring the claim, the Court relied on two different rationales. First, the Court pointed to the plain meaning of the phrase "foreign country." Observing that "[w]e know of no more accurate phrase in common English usage than 'foreign country' to denote territory subject to the sovereignty of another nation,"<sup>93</sup> Justice Reed, speaking for the majority, concluded that the claim was barred because the airfield "where this claim 'arose' remains subject to the sovereignty of Great Britain and lay within a 'foreign country.'"<sup>94</sup> Second, the Court reasoned that the legislative history behind the foreign country exception did not support Spelar's claim.<sup>95</sup> In respecting Congress' unwillingness to subject the United States to "liabilities depending upon the laws of a foreign power," the Court held that "[t]he present suit, premised entirely upon Newfoundland's law, may not be asserted against the United States in contravention of that policy."<sup>96</sup>

In reaching its decision, the Court distinguished its previous holding in *Vermilya-Brown Co. v. Connell*,<sup>97</sup> where it held that under the Fair Labor Standards Act (FLSA), the same airfield was a "possession" of the United States.<sup>98</sup> These inconsistent results were rationalized by the Court with the explanation that the statutory language and legislative history of the FTCA were different from that of the FLSA.<sup>99</sup> In further rationalizing its decision to invoke the foreign country exception, the Court emphasized the concept of sovereignty and held that the lease of an air base by the United States from a foreign country does not result in the transfer of sovereignty.<sup>100</sup>

Relying on the legislative history and policies of the foreign country

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92. *Id.*

93. *Id.* But see *Spelar*, 338 U.S. at 223-24 (Frankfurter, J., concurring) (criticizing such a definitional explanation as simplistic).

94. *Id.* at 219.

95. *Id.* at 219-21; see also *supra* notes 72-74 and accompanying text.

96. *Spelar*, 338 U.S. at 221.

97. 335 U.S. 377 (1949).

98. *Id.* at 390.

99. See *Spelar*, 338 U.S. at 224-25 (Jackson, J., concurring). Justice Jackson reflected: If an employee should chance to work overtime on a leased air base, he can maintain an action for extra wages, penalties and interest, because the Court finds the air base to be a "possession" of the United States. However, if he is injured at the same place, he may not proceed under the Tort Claims Act to recover, because the Court finds the air base then to be a "foreign country."

100. *Id.* at 221-22. The Court further dismissed any possible inconsistency by stating that in *Vermilya-Brown* "we there held no more than the word 'possessions' does not necessarily imply sovereignty. . . ." *Id.* at 222. Moreover, the leased bases were not in existence at the time the FLSA was passed. Therefore, *Vermilya-Brown* was viewed as an attempt to determine what Congress would have done if faced with the existence of the leased bases when it passed the Act. With regard to the FTCA foreign country exception, the Court stated that "the *Vermilya-Brown* problem of determining what Congress would have done when faced with a new situation does not exist at all in the present case." *Id.*

exception as enunciated in *Spelar*, courts uniformly expanded the meaning of "foreign country," even as they sidestepped the concept of sovereignty the Supreme Court found so compelling in *Spelar*.<sup>101</sup> In the years following World War II, courts repeatedly denied jurisdiction over claims arising in areas occupied by the United States during wartime, even when the United States imposed its own laws and regulations during its occupation and later assumed powers of administration through treaty or United Nations trusteeship.<sup>102</sup>

Courts also widened the scope of the foreign country exception by classifying embassies<sup>103</sup> and military bases<sup>104</sup> as foreign countries. Although there has been some recent liberalization of the foreign country exception to allow claims to proceed where the negligent act or omission occurred in the United States,<sup>105</sup> or in both the United States and a foreign country,<sup>106</sup> that liberalization has not taken place where the foreign country involved is a military base.

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101. See, e.g., *Burna v. United States*, 240 F.2d 720, 722 (4th Cir. 1957) (peace treaty with Japan did not amount to sovereignty); *Cobb v. United States*, 191 F.2d 604, 608 (9th Cir. 1951) (Okinawa constituted a foreign country despite temporary United States sovereignty during World War II), *cert. denied*, 342 U.S. 913 (1952).

102. See, e.g., *Callas v. United States*, 253 F.2d 838, 840 (2d Cir.) (Island of Kwajalein a foreign country despite United States' occupation and court system), *cert. denied*, 357 U.S. 936 (1958); *Burna v. United States*, 240 F.2d 720, 721-22 (4th Cir. 1957) (Okinawa a foreign country because the United States, although exercising sovereignty, did not intend to retain territory permanently); *Cobb v. United States*, 191 F.2d 604, 608 (9th Cir. 1951) (Okinawa a foreign country despite United States control because, although United States exercised de facto sovereignty, it lacked de jure sovereignty), *cert. denied*, 342 U.S. 913 (1952); *Brunell v. United States*, 77 F. Supp. 68, 72 (S.D.N.Y. 1948) (Saipan a foreign country despite military occupation by United States). See generally Bederman, *Foreign Country Exception in Antarctica*, *supra* note 65, at 742-45.

103. See *Meredith v. United States*, 330 F.2d 9, 10 (9th Cir.) (United States Embassy in Bangkok, Thailand) ("Under *Spelar*, the words 'in a foreign country' . . . must be read to include the embassy buildings and grounds or liability of the United States . . . will be determined by the law of a foreign power, contrary to the purposes of Congress."), *cert. denied*, 379 U.S. 867 (1964); *Gerritson v. Vance*, 488 F. Supp. 267, 268 (D. Mass. 1980) (court lacked jurisdiction over claim by plaintiff injured on grounds of United States embassy in Zambia).

104. See *Eaglin v. United States*, 794 F.2d 981, 984 (5th Cir. 1986) (slip and fall claim in Germany); *Heller v. United States*, 776 F.2d 92, 95 (3d Cir. 1985) (negligent medical treatment of serviceman's wife at Air Force base in Philippines), *cert. denied*, 476 U.S. 1105 (1986); *Broadnax v. United States*, 710 F.2d 865, 867 (D.C. Cir. 1983) (medical malpractice in Germany); *Grunch v. United States*, 538 F. Supp. 534, 537 (E.D. Mich. 1982) (negligent medical care in Germany); *Bryson v. United States*, 463 F. Supp. 908, 911 (E.D. Pa. 1978) (wrongful death claim in West Germany); *Roberts v. United States*, 498 F.2d 520, 522 (9th Cir.) (wrongful death action arising out of airplane crash in waters near United States air base in Okinawa), *cert. denied*, 419 U.S. 1070 (1974); *Manemann v. United States*, 381 F.2d 704, 705 (10th Cir. 1967) (negligent medical care in Taiwan); *Rafferty v. United States*, 150 F. Supp. 618, 618 (E.D. La. 1957) (medical malpractice claim occurring on military base in Germany).

105. See *infra* notes 118-127 and accompanying text.

106. See *infra* notes 123-127 and accompanying text.

In *Heller v. United States*,<sup>107</sup> for example, the wife of a U.S. serviceman was negligently treated by military doctors at an Air Force hospital on an American military base in the Philippines. Upon the couple's return to the United States, the serviceman's wife was diagnosed with inoperable cancer which the military doctors had failed to detect. In a subsequent wrongful death action, the government was held immune from suit because the claim arose in a foreign country<sup>108</sup> despite the extensive and near exclusive government control over the military installation.<sup>109</sup>

Although the Congressional purpose of protecting the United States from being judged in accordance with laws of foreign powers is an appropriate justification for implementing the foreign country exception, application of the exception in many instances leads to incongruous results. For example, had the patient in *Heller* been treated in a stateside military hospital, the government could have been sued successfully. Only the accident of location protected the government in *Heller* from responsibility for the wrongful acts of its employees. Consequently, the government's liability turned solely on the fortuity of the serviceman's assignment.

In today's armed forces, the foreign country exception represents a bar to countless meritorious claims. Thousands of American service members are stationed overseas. For the most part, they live on American military installations run by the United States government in accordance with federal laws. Their spouses and children live with them with the knowledge and approval of the United States government. They shop at stores owned and operated by the government, and they pay for goods with American currency. They seek medical treatment at military facilities run by American doctors in accordance with American standards. In short, overseas military installations are, in reality, enclaves of American sovereignty. Nevertheless, the foreign country exception remains intact, barring all suits against the government which arise out of

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107. 776 F.2d 92 (3d Cir. 1985), *cert. denied*, 476 U.S. 1105 (1986).

108. *Id.* at 96-97. In holding the suit came within the scope of the foreign country exception, the Third Circuit relied on the uniform holdings of other appellate courts that the exception applies to torts committed by military personnel stationed abroad. The court also interpreted *Spelar* as requiring two conditions for the exception to apply: first, the tort must occur in a jurisdiction outside United States sovereignty; second, the United States must be subject to liability based upon foreign law. *Id.* at 95-96.

109. *Id.* at 96. The court rejected the argument that "if the United States exercises any jurisdiction over its nationals in foreign countries, foreign sovereignty by definition could not exist." *Id.* Although the United States maintained sovereignty over its Philippine military bases after World War II, and by later agreement with the Philippine government, had retained "command and control over its facilities [and] personnel. . ." the court nonetheless found that the two *Spelar* conditions were satisfied. *Id.* n.3 (citing *Agreement Between the United States of America and the Republic of the Philippines Concerning Military Bases*, March 14, 1947, as amended January 7, 1979, 30 U.S.T. 863, 879, T.I.A.S. No. 9224).

activities in foreign countries.<sup>110</sup>

### C. *Determining When a Claim "Arises in" a Foreign Country*

In order to determine whether the foreign country exception applies, courts must decide where the claim arose.<sup>111</sup> Under the FTCA, a tort claim "arises" where the alleged negligent act or omission "occurred."<sup>112</sup> In *Richards v. United States*,<sup>113</sup> the Supreme Court held that liability under the FTCA is decided under the law of the place where the negligent act or omission occurs, not the law of the site of the injury or the place where the negligence has its "operative effect."<sup>114</sup> Therefore, where a negligent act takes place in a foreign country, but results in an injury in the United States, the claim "arises in a foreign country" and is barred by the foreign country exception.<sup>115</sup> If, however, the negligent act occurs in the United States, even though the act had its "operative effect" in a foreign country, the claim does not fall within the foreign country exception.<sup>116</sup>

Judicial construction of the foreign country exception generally has centered on the meaning of "arising in," and not on the definition of a foreign country. Courts have focused on where the negligent act or omission occurred, not whether the injury took place on foreign soil.<sup>117</sup> Typically, the plaintiff will concede that the injury occurred in a foreign country; what remains in dispute, however, is the characterization of the negligent "act or omission," and the determination of where such negligence took place.

In *In re Paris Air Crash of March 3, 1974*,<sup>118</sup> a federal district court held that the foreign country exception did not bar claims against the United States for deaths resulting from an airplane crash in France. According to the court, all of the alleged negligent conduct, whether acts or omissions, took place in California. Thus, the plaintiffs' claims arose in

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110. Although Congress has retained its immunity from claims arising in foreign countries, it has created administrative remedies which arguably take some sting out of the foreign country exception. See, e.g., 10 U.S.C. §§ 2731-2737 (1982) (providing for settlement of claims for property loss, personal injury or death)

111. See 28 U.S.C. § 2680(k) (1982), which provides in pertinent part that "[t]he provisions of this chapter and § 1346(b) of [the FTCA] shall not apply to [a]ny claim arising in a foreign country." (emphasis supplied).

112. See 28 U.S.C. § 1346(b) (1982), which provides that "[t]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States . . . in accordance with the law of the place where the act or omission occurred."

113. 369 U.S. 1 (1962).

114. *Id.* at 9-10.

115. See *Manemann v. United States*, 381 F.2d 704, 705-06 (10th Cir. 1967) (medical malpractice committed in Taiwan, but resulting in an injury in the United States, barred).

116. See *Sami v. United States*, 617 F.2d 755, 761-63 (D.C. Cir. 1979) (claim against United States arising from message sent by United States liaison with Interpol, resulting in wrongful detention of plaintiff by German officials, not barred).

117. See *id.* at 761-62; see also *Beattie v. United States*, 756 F.2d 91, 96 (D.C. Cir. 1984).

118. 399 F. Supp. 732 (C.D. Cal. 1975).

California, where the government's alleged negligence occurred, rather than in France, where the injury took place.<sup>119</sup>

Similarly, the Ninth Circuit in *Leaf v. United States*<sup>120</sup> held that, although the loss occurred in Mexico, the claim did not arise in a foreign country because the negligent acts occurred in California and Arizona.<sup>121</sup> In *Leaf*, a Drug Enforcement Agency (DEA) informant, acting with the consent of DEA agents, leased a plane from the plaintiffs in California. The informant and a suspected drug smuggler took the plane to Arizona and then to Mexico. The plane was damaged in an aborted takeoff caused by the excess weight of an illegal marijuana cargo. The plane was then sunk in a reservoir in Mexico to prevent the police from finding it. The plaintiff alleged that negligent acts by the government in California and Arizona relating to the planning and execution of the DEA operation, and its failure to disclose the true purpose of the plane lease, proximately caused the damage to their plane. The Ninth Circuit held that the claim arose in California, where the plane was leased, and in Arizona, where the plane flew before going to Mexico, rather than in Mexico, where the loss occurred.<sup>122</sup>

Finally, in *Glickman v. United States*,<sup>123</sup> a federal district court held that the foreign country exception did not bar a suit filed by an American who alleged that, while he was in Paris in 1952, Central Intelligence Agency agents secretly gave him LSD in an experiment. In support of its holding, the court reasoned that, although certain activities implementing the program to administer the drugs were carried out in France, the program originated, was designed, and was set in operation in the United States.<sup>124</sup> Thus, the court concluded that the plaintiff's claim arose in the United States, where the negligent acts proximately causing the plaintiff's injuries occurred.<sup>125</sup>

*In re Paris Air Crash*, *Leaf*, and *Glickman* stand for the proposition that courts will not exempt the United States from liability for acts or omissions occurring in the United States even though their operative effects occur in other countries. These claims are commonly referred to as "headquarters claims."<sup>126</sup> These cases support the central FTCA goal of waiving governmental immunity in the interest of fair play and justice. Moreover, the cases do not conflict with the Act's underlying policy of avoiding the risk of exposing the United States to unreasonable liability under foreign law. As one court noted, such a policy consideration "has little bearing on a case where the acts or omissions complained of occurred in [the United States] because in such cases liability will be deter-

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119. *Id.* at 737.

120. 588 F.2d 733 (9th Cir. 1978).

121. *Id.* at 735.

122. *Id.*

123. 626 F. Supp. 171 (S.D.N.Y. 1985).

124. *Id.* at 174.

125. *Id.*

126. *See Beattie v. United States*, 756 F.2d 91, 96 (D.C. Cir. 1984).

mined under [United States] law."<sup>127</sup> Where the nexus or connection between the injury and the negligence is too remote, however, courts have denied headquarters claims.<sup>128</sup>

In *Cominotto v. United States*,<sup>129</sup> the Ninth Circuit dismissed a claim because the plaintiff had failed to establish a proximate connection between the alleged negligence in the United States and the resulting damage in Thailand. The plaintiff, a DEA informant, was solicited by the Secret Service to assist in an undercover counterfeiting operation. The plaintiff first met Secret Service agents in California, and then again in Honolulu, Manila, and Malaysia. The plaintiff was shot in the leg by suspected counterfeiters during an undercover operation in Thailand. The plaintiff's headquarters claim alleged that the United States government had been negligent in planning the Thailand investigation.<sup>130</sup>

The court acknowledged that headquarters claims are available to FTCA plaintiffs when negligent acts in the United States proximately cause harm in a foreign country.<sup>131</sup> Here, however, the plaintiff had failed to establish proximate cause, because the facts indicated that the plaintiff's violation of Secret Service instructions, and his subsequent attempt to escape from the dangerous situation in which he had placed himself, was the sole and proximate cause of his injuries.<sup>132</sup> Thus, the court concluded that the plaintiff "broke any chain of causation which might have existed between Secret Service activities in the United States and [the plaintiff's actions and resulting injury] in Thailand."<sup>133</sup>

Similarly, in *Eaglin v. United States*,<sup>134</sup> the Fifth Circuit held that the plaintiff's headquarters claim was barred because the plaintiff had failed to show a causal nexus between the alleged negligence in the United States and the injury in West Germany. In *Eaglin*, the plaintiff was a civilian dependent from Louisiana living on a United States Army base in West Germany. While on her way to a required exercise, she slipped and fell on a patch of "black ice" on the base. Eaglin sued the government for negligently failing to inform her while she was in the United States about the weather hazards she would encounter in West Germany, and for negligently failing to instruct her in how to discover or avoid those hazards.<sup>135</sup>

In dismissing the claim, the Fifth Circuit held that the connection between the plaintiff's injury in West Germany and any act or omission by military personnel in the United States was too tenuous and re-

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127. *Sami v. United States*, 617 F.2d 755, 763 (D.C. Cir. 1979).

128. *See Cominotto v. United States*, 802 F.2d 1127, 1130-31 (9th Cir. 1986); *Eaglin v. United States*, 794 F.2d 981, 983-84 (5th Cir. 1986).

129. 802 F.2d 1127 (9th Cir. 1986).

130. *Id.* at 1129.

131. *Id.* at 1130 (citing *Leaf v. United States*, 588 F.2d 733, 736 (9th Cir. 1978)).

132. *Id.*

133. *Id.*

134. 794 F.2d 981 (5th Cir. 1986).

135. *Id.* at 982.

mote.<sup>136</sup> The court found that there was no negligent act performed in the United States that directly caused the plaintiff's injury in West Germany.<sup>137</sup>

While the issue of proximate cause may prove to be a stumbling block in raising a headquarters claim, recent lower court decisions indicate that courts are willing to separate negligent acts or omissions occurring in the United States from those occurring in foreign countries and to provide compensation for injuries resulting from the former.<sup>138</sup> In *Vogelaar v. United States*,<sup>139</sup> for example, a federal district court held that when a plaintiff alleges several negligent acts or omissions, those occurring in the United States are actionable even if those occurring in a foreign country are barred by the foreign country exception.<sup>140</sup>

In *Vogelaar*, the mother of a serviceman killed in Vietnam sued the government for its failure to properly investigate the circumstances of her son's disappearance, to properly care for his remains, and to timely identify and deliver her son's remains. The serviceman had been listed as a deserter until his remains were discovered, approximately two years after his death, on the site of the base where he had been stationed. The court looked separately at the three omissions alleged by the plaintiffs and found that the court lacked subject matter jurisdiction over the first two because they occurred in Vietnam.<sup>141</sup> The court, however, found that the third omission—that of failing to timely identify and deliver her son's remains—occurred at a military center in Indiana. The court, therefore, allowed the plaintiff's claim for the negligent omission which occurred in Indiana.<sup>142</sup>

The federal district court for the Eastern District of New York reached a similar conclusion in *In re "Agent Orange" Product Liability Litigation*.<sup>143</sup> In that case, Vietnam veterans and members of their families brought a products liability class action suit to recover damages for injuries allegedly sustained as a result of veterans' exposure to Agent Or-

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136. *Id.* at 984. The court stated that "were we to adopt a 'headquarters' exception to section 2680(k) for the foreign nation results of negligent training or supervision conducted in the United States . . . the nexus between [the claim of negligence] in the United States is simply too tenuous and remote." *Id.* The court also relied on the Supreme Court's recent limitation on the ability of plaintiffs to avoid jurisdictional issues under the FTCA by splitting a cause of action. See *United States v. Shearer*, 473 U.S. 52 (1985).

137. *Eaglin*, 794 F.2d at 984. ("If black ice is peculiar to, or common in, West Germany, then the obvious place to warn the servicemen and their dependents of this danger is in West Germany, not in Louisiana.").

138. See *infra* notes 139-152 and accompanying text. But see *Grunch v. United States*, 538 F. Supp. 534, 537 (E.D. Mich. 1982) (where act of negligence which allegedly took place in the United States, flowed directly from acts occurring in West Germany, entire claim is barred by foreign country exception).

139. 665 F. Supp. 1295 (E.D. Mich. 1987).

140. *Id.* at 1302.

141. *Id.* at 1300.

142. *Id.* at 1307.

143. 580 F. Supp. 1242 (E.D.N.Y.), *appeal dismissed*, 745 F.2d 161 (2d Cir. 1984).



ange in Vietnam. The chemical companies impleaded the United States. The court determined that, although there were many negligent acts in both the United States and Vietnam which contributed to the veterans' injuries, there was no policy reason to bar the claims under the foreign claim exception.<sup>144</sup> After applying a headquarters claim analysis, the court found it "undisputed that the initial decision to use Agent Orange, the decision to continue using it, and decisions relating to the specifications for Agent Orange were made in [the United States.]"<sup>145</sup> The court noted also that, while it was unclear whether alleged government misuse of Agent Orange took place in the United States or Vietnam, there was no reason to attribute such acts or omissions to Vietnam rather than to the United States.<sup>146</sup>

The *Agent Orange* analysis was adopted by the Court of Appeals for the District of Columbia Circuit in *Beattie v. United States*.<sup>147</sup> In *Beattie*, a plane crashed into Mount Erebus, Antarctica, killing all persons on board. In an action for wrongful death under the FTCA, the plaintiffs alleged negligence by United States air traffic controllers at McMurdo Naval Air Station, Antarctica. Plaintiffs also alleged negligence by Department of Defense officials in the selection, training, and supervision of Navy personnel at McMurdo Base.<sup>148</sup>

As in *Agent Orange*, the court was presented with an undetermined mix of acts and omissions, some occurring within the United States and others in Antarctica.<sup>149</sup> In holding that the foreign country exception did not bar the plaintiffs' claims, the court accepted the proposition that Section 2680(k) "is not a bar to jurisdiction over cases arising at least in part outside the United States, and in areas where there is no theoretical justification for application of foreign law."<sup>150</sup> In its decision, the court separated the claims arising from negligence at McMurdo Base (Antarctica claims) and the claims arising from negligence in the United States (headquarters claims).<sup>151</sup> The court then determined that the headquar-

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144. *Id.* at 1255. The court did find, however, that the servicemens' and derivative family members' claims were barred by the *Feres* doctrine, *id.* at 1247, and could be barred by the discretionary function exception. *Id.* at 1255-56. The court did allow the independent claims of the servicemens' wives and children to go forward. *Id.* at 1254.

145. *Id.* at 1255.

146. *Id.*

147. 756 F.2d 91, 98 (D.C. Cir. 1984).

148. *Id.* at 93.

149. *Id.* at 96. The court held that the headquarters claims consisted of the allegations of negligent selection, training, and supervision of the McMurdo Air Traffic Controllers by officials in Washington, D.C. Since these claims alleged negligent acts or omissions by government employees which occurred within the United States, and which merely had their operative effect in Antarctica, the claims did not arise in a foreign country. *Id.*

150. *Id.* (quoting *In re "Agent Orange"* Prod. Liab. Litig., 580 F. Supp. 1242, 1254) (E.D.N.Y.), *appeal dismissed*, 745 F.2d 161 (2d Cir. 1984)).

151. *Id.* The court also allowed the Antarctica claims to proceed, holding that Antarctica was not a foreign country under the FTCA. *Id.* at 94.

ters claims—based on allegations of negligent selection, training, and supervision of McMurdo Air Traffic Controllers by officials in Washington, D.C.—were not barred by the foreign country exception because they did not “arise in” a foreign country.<sup>152</sup>

#### D. Conclusion

The broad definitions of “foreign country” and “arising in” often used by courts to dismiss FTCA claims should be more narrowly construed to achieve the central FTCA policy of fairness and justice. Specifically, American embassies and military bases abroad should not be considered foreign countries under the FTCA. While it is true that these facilities are on foreign soil, they are nonetheless enclaves of American sovereignty. As such, members of these communities should be granted the same waiver of governmental immunity enjoyed by Americans living in the United States.

The recent expansion of headquarters claims, for acts or omissions which take place, in whole or in part, in the United States, is a step in the right direction. Fears that such an expansion would lead to a flood of FTCA claims sidestepping the foreign country exception<sup>153</sup> have not been realized.<sup>154</sup> Allowing claims to go forward if any governmental negligence took place in the United States strikes the proper balance between the policies behind both the FTCA and the foreign country exception.

Rather than focusing on a broad definition of “foreign country,” courts should look at claims to see if they arise, in whole or in part, in the United States. Upon an affirmative showing, plaintiffs should be permitted to seek redress for their injuries. The fortuitous circumstance of location should not bar suits where United States law could be applied and the United States would not be subject to the laws of a foreign power.

#### IV. CLAIMS ARISING UNDER THE *FERES* DOCTRINE

Although members of the armed forces stationed abroad may find their FTCA claims barred by the foreign country exception, service members stationed in the United States may find their claims barred by the judicially-created exception enunciated by the Supreme Court in *Feres v. United States*.<sup>155</sup> The *Feres* doctrine bars all service member claims for injuries “incident to service.”<sup>156</sup> Prior to the Court’s enuncia-

152. *Id.* at 96. The court reasoned that “[s]ince these claims allege negligent acts or omissions by government employees which occur within the United States, and which merely had their operative effect in Antarctica, they are not claims which ‘arise in’ a foreign country.” *Id.*

153. See *Beattie v. United States*, 756 F.2d 91, 119 (D.C. Cir. 1984) (Scalia, J., dissenting).

154. See *Bederman, Foreign Country Exception in Antarctica*, *supra* note 65, at 737.

155. 340 U.S. 135 (1950).

156. *Id.* at 146. While the Supreme Court chose to create a much broader service mem-

tion of the *Feres* doctrine, lower courts barred service member claims only if they fell within a narrow construction of 28 U.S.C. § 2680(j),<sup>157</sup> the "combatant activities" exception to the FTCA.<sup>158</sup>

Although the *Feres* doctrine has been severely criticized by courts and commentators,<sup>159</sup> the Supreme Court has appeared unwilling to limit its application or to overrule it entirely. Recent alignments within the Court, however, and the appointment of Justices who have shown an inclination to restrict *Feres*, provide hope that the FTCA soon will be a true waiver of immunity for service members.<sup>160</sup>

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- ber exception than that enacted by Congress, 28 U.S.C. § 2680(j) (1982), the Court failed to clearly define the phrase "incident to service," or provide a clear, explicit set of standards or guidelines for lower courts to follow in applying the *Feres* doctrine.
157. 28 U.S.C. § 2680(j) (1982). This exception reserves governmental immunity for "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."
  158. See, e.g., *Employer's Fire Ins. Co. v. United States*, 167 F.2d 655, 657 (9th Cir. 1948) (FTCA should not be narrowed by judicial construction to exclude claims); *Skeels v. United States*, 72 F. Supp. 372, 374 (W.D. La. 1947) (combat activities exception contemplates actual warfare or conflict, not mere practice or training away from the zone of combat during time of war); *Wojciuk v. United States*, 74 F. Supp. 914, 916 (E.D. Wis. 1947) (FTCA claims not expressly excluded from the operation of the Act must be held to have been intended to be included).
  159. See, e.g., *United States v. Johnson*, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting, joined by Brennan, Marshall, and Stevens, J.J.) ("*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received.") (citations omitted) (quoting *In re "Agent Orange"* Prod. Liab. Litig., 550 F. Supp. 1242, 1246 (E.D.N.Y.) *appeal dismissed* 745 F.2d 161 (2d Cir. 1984); *Hinkie v. United States*, 715 F.2d 96, 97 (3d Cir. 1983) ("We are forced once again to decide a case where 'we sense the injustice . . . of [the] result' ") (citation omitted) (quoting *Peluso v. United States*, 474 F.2d 605, 606 (3d Cir.), *cert. denied*, 414 U.S. 879 (1973)), *cert. denied*, 465 U.S. 1023 (1984); *Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982) (applying *Feres* "reluctantly" and "regret[ting] the effects" of the conclusion); *Hunt v. United States*, 636 F.2d 580, 589 (D.C. Cir. 1980) ("The *Feres* doctrine clearly lives, although its theoretical bases remain subject to serious doubt."); *Veillette v. United States*, 615 F.2d 505, 506 (9th Cir. 1980) (applying *Feres* "reluctantly"); *Peluso v. United States*, 474 F.2d 605, 606 (3d Cir.) ("If the matter were open to us we would be responsive to the appellants' argument that *Feres* should be reconsidered"), *cert. denied*, 414 U.S. 879 (1973); *In re "Agent Orange"* Prod. Liab. Litig., 580 F. Supp. 1242, 1247 (E.D.N.Y.) ("Perhaps a pathbreaking appellate court might discern enough emanations of Supreme Court disquiet to predict that Court's future conduct in limiting *Feres*"), *appeal dismissed*, 745 F.2d 161 (2d Cir. 1984); see also Schwartz, *Making Intramilitary Tort Law More Civil: A Proposed Reform of the Feres Doctrine*, 95 YALE L.J. 992, 992-99 (1986) [hereinafter Schwartz, *A Proposed Reform of the Feres Doctrine*]; Bennett, *The Feres Doctrine, Discipline and the Weapons of War*, 29 ST. LOUIS U.L.J. 383, 385 (1984); Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F. L. REV. 24, 40-43 (1976); Hitch, *The Federal Tort Claims Act and Military Personnel*, 8 RUTGERS L. REV. 316 (1954); Note, *Servicemembers' Rights Under the Feres Doctrine: Rethinking "Incident to Service" Analysis*, 33 VILL. L. REV. 175, 176 n.7 (1988) [hereinafter Note, *Rethinking "Incident to Service" Analysis*]; Note, *From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099, 1099-1100 (1979).
  160. A full discussion of the claims of service members' families is beyond the scope of this Article. See generally Comment, *The Feres Doctrine: Has It Created Remedi-*

A. *Pre-Feres "Incident to Service" Approach: Military Status Alone Does Not Bar FTCA Recovery*

Shortly after the FTCA was enacted, the Supreme Court considered whether military service members could recover under the Act for non-wartime injuries. In *Brooks v. United States*,<sup>161</sup> two servicemen and their father were struck by a United States Army truck while driving on a North Carolina highway. One of the servicemen was killed; the other two men were seriously injured. The two survivors, and the estate of the deceased, brought suit against the United States under the FTCA.<sup>162</sup> The Supreme Court deemed the suits proper after concluding that there was no applicable exception barring suits for injury or death by members of the armed forces not incident to military service.<sup>163</sup>

In reaching its decision, the Court noted that, if Congress had intended "any claim" to mean "any claim but that of servicemen," it

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*less Wrongs for Relatives of Servicemen?*, 44 U. PITT. L. REV. 929 (1983); Note, *Pushing the Feres Doctrine a Generation Too Far: Recovery for Genetic Damage to the Children of Servicemen*, 32 AM. U.L. REV. 1039 (1983); Note, *If You Can't Save Us, Save Our Families: The Feres Doctrine and Servicemen's Kin*, 1983 U. ILL. L. REV. 317.

Briefly, the claims of family members of a service member have been barred when those claims are for injuries suffered by that service member "incident to [military] service." See, e.g., *DeFont v. United States*, 453 F.2d 1239, 1240 (1st Cir.) (wife cannot sue the United States for wrongful death of serviceman-husband, even though her claim is independent of husband's estate, because husband would be barred under *Feres* from suing if he had survived), *cert. denied*, 407 U.S. 910 (1972). Family member claims have been permitted, however, when they are for independent injuries, even when a service member-family member is also injured in the same accident, and whose claim is therefore barred by *Feres*. See, e.g., *Orken v. United States*, 239 F.2d 850, 850 (6th Cir. 1956) (estate of wife and children of serviceman, all killed when Air Force plane crashed into their home on military base, could bring suit against the United States for wrongful death, notwithstanding that suit for wrongful death of serviceman-husband was barred by *Feres*).

Courts recently have addressed the more difficult question of whether *Feres* bars the independent claims of service members' wives and children for their own direct injuries resulting from service members' exposure to radiation during and after World War II, or exposure to the herbicide Agent Orange in Vietnam. See, e.g., *Hinkie v. United States*, 715 F.2d 96, 98 (3d Cir. 1983) (barring claims of serviceman's family members for injuries allegedly caused by serviceman's exposure to radiation during active duty), *cert. denied*, 465 U.S. 1021 (1984); *Mondelli v. United States*, 711 F.2d 567, 569-70 (3d Cir. 1983) (same), *cert. denied*, 465 U.S. 1021 (1984); *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 1242, 1247-54 (E.D.N.Y.) (allowing independent claims for children's genetic injuries and birth defects and wives' miscarriages caused by service members' exposure to Agent Orange to go forward), *appeal dismissed*, 745 F.2d 161 (2d Cir. 1984).

161. 337 U.S. 49 (1949).

162. The district court entered judgment against the government in favor of all three plaintiffs. The government did not contest the father's judgment. *Id.* at 50. On appeal, the Fourth Circuit reversed, holding that the two brothers were in the armed forces at the time of the crash, and were therefore barred from recovery. *United States v. Brooks*, 169 F.2d 840, 846 (4th Cir. 1948), *rev'd*, 337 U.S. 49 (1949).

163. *Brooks*, 337 U.S. at 51.

would have made that intent clear by a separate exception.<sup>164</sup> Although Congress listed twelve exceptions to the Act, none explicitly excluded service member claims for injuries not arising out of wartime activities.<sup>165</sup> Finally, the Court found support for its decision in the Act's legislative history, which implied that Congress had considered, and rejected, a specific exception barring all suits by members of the armed forces.<sup>166</sup>

According to the *Brooks* Court, military status alone does not bar FTCA recovery; only suits arising from actions "incident to service" may be barred.<sup>167</sup> Unfortunately, the Court was not clear in defining the term "incident to service." Moreover, the Court undermined its own interpretation of Congress' intent. In dictum, the Court noted that interpretation of "incident to service" may vary with the consequences, because "those consequences may provide insight for determination of congressional purpose."<sup>168</sup> The Court speculated that the "dire consequences" envisioned by the government<sup>169</sup> if service members' suits were allowed may reflect congressional intent to bar such claims, despite the Act's "literal language and other considerations to the contrary."<sup>170</sup> Because the Court concluded that *Brooks* did not involve service members injured "incident to service," it left the interpretational problems of this phrase for another day.

### B. *The Feres Doctrine: "Incident to Service" Expanded*

That day came with the Supreme Court's decision in *Feres v. United States*.<sup>171</sup> In *Feres*, the Court consolidated three cases for review, all of which raised similar issues.<sup>172</sup> The lead case arose out of the fiery death

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164. *Id.* The Court observed that "[i]t would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain." *Id.*

165. *Id.* In particular, the Court noted the foreign country and combatant activities exception.

166. *Id.* at 51-52. The Court noted that, of the 18 versions of the bills introduced in Congress between 1925 and 1935, 16 had exceptions denying recovery to service members. Yet, in all bills introduced after 1935, including the current version, "the exception concerning servicemen had been dropped." *Id.* at 52.

167. *Id.* "[W]e are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident *incident to the Brooks' service*, a wholly different case would be presented." *Id.* (emphasis added).

168. *Id.*

169. "A battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, all would ground tort actions against the United States." *Id.*

170. *Id.* at 53.

171. 340 U.S. 135 (1950).

172. *Feres v. United States*, 177 F.2d 535 (2d Cir. 1949), *aff'd*, 340 U.S. 135 (1950); *Jefferson v. United States*, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom. Feres v. United States*, 340 U.S. 135 (1950); *United States v. Griggs*, 178 F.2d 1 (10th Cir. 1949), *rev'd sub nom. Feres v. United States*, 340 U.S. 135 (1950).

In *Feres*, a serviceman was killed in a fire in his barracks while on active duty.

of a serviceman, allegedly as a consequence of the government's decision to quarter him in barracks which were known to be a fire hazard.<sup>173</sup> The other two cases arose out of allegedly negligent medical treatment provided to active duty personnel.<sup>174</sup> The plaintiffs in each case sought recovery under the FTCA.

The *Feres* Court read into the FTCA a new, unstated exception to the waiver of sovereign immunity contrary to the explicit terms of the FTCA. The Court held that the government "is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."<sup>175</sup> Because each of the individuals on behalf of whom suit was brought sustained injuries "while on active duty and not on furlough,"<sup>176</sup> the claims were deemed incident to military service and thus barred.

In reaching its decision, the Court rejected three arguments in favor of allowing recovery by service members for injuries sustained while in the armed forces but not in the line of active duty: first, that the Act provides for suits alleging negligence of military personnel, because it defines "employee of the government" to include "members of the military or naval forces of the United States";<sup>177</sup> second, that under maxims of statutory interpretation, the existence of express exceptions, particularly the combatant exception,<sup>178</sup> means that no additional exceptions should be implied;<sup>179</sup> and finally, that the legislative history of the Act, as

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His estate sued the government for negligence in housing him in barracks known or which should have been known to be unsafe because of a defective heating plant, and in failing to maintain an adequate fire watch. The district court dismissed the case and the Second Circuit affirmed. *Feres*, 340 U.S. at 136-37.

In *Jefferson v. United States*, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom. Feres v. United States*, 340 U.S. 135 (1950), a serviceman sued the government for medical malpractice. The serviceman, while in the Army, underwent an abdominal operation, during which a towel, two and one-half feet long by one and one-half feet wide, marked "Medical Department U.S. Army," was found in his stomach. The district court dismissed the claim after concluding as a matter of law that the FTCA did not cover service-connected disabilities occurring while the plaintiff was enlisted. *Jefferson*, 77 F. Supp. at 711. The Fourth Circuit affirmed after concluding that Congress had not intended that courts question the "propriety of military decisions and actions" by allowing the claims of service members under the FTCA. *Jefferson*, 178 F.2d at 520.

In the third case, *United States v. Griggs*, 178 F.2d 1 (10th Cir. 1949), *rev'd sub nom. Feres v. United States*, 340 U.S. 135 (1950), the Tenth Circuit held that the estate of an Army officer could recover under the FTCA for wrongful death caused by the negligence of members of the Army Medical Corps. *Griggs*, 178 F.2d at 3.

173. *Feres*, 340 U.S. at 137.

174. *Id.*

175. *Id.* at 146.

176. *Id.* at 138.

177. *Id.* Therefore, suits of negligence by military personnel against other military personnel were within the contemplation of the Act.

178. 28 U.S.C. § 2680(j) (1982).

179. *Feres v. United States*, 340 U.S. 135, 138 (1949). The existence of a wartime combatant activities exception could be said to imply allowance of claims by service

discussed in *Brooks*,<sup>180</sup> and the *Brooks* opinion itself, support allowing suits by service members against the government where the injuries do not arise from actual combat.<sup>181</sup> The Court rejected all three arguments and offered three rationales in support of its decision.<sup>182</sup>

First, the Court noted the lack of a parallel private liability for torts committed by military personnel of the armed forces.<sup>183</sup> The FTCA provides that the United States will be liable "in the same manner and to the same extent as a private individual under like circumstances."<sup>184</sup> The Court could find no private liability "even remotely analogous" to the liability asserted by service members against the government.<sup>185</sup> Moreover, the Court noted that, because "no private individual has power to conscript or mobilize a private army," there can be no parallel liability "under like circumstances."<sup>186</sup> In the absence of such parallel private liability, and in the absence of any American law "permitt[ing] a soldier to recover for negligence, against either his superior officers or the government he is serving," the Court declined to find analogous liability.<sup>187</sup>

The second rationale the *Feres* Court relied on was the "distinctively federal" relationship between the government and service members.<sup>188</sup> The FTCA provides that "the law of the place where the act or omission occurred" governs any consequent liability.<sup>189</sup> According to the Court, Congress could not have intended the Act to apply to service-connected injuries because such an interpretation would subject a service member to the "law of the place where the act or omission occurred."<sup>190</sup> Since service members are not free to choose where they live, they have no power to decide the jurisdiction in which they could bring suit.<sup>191</sup>

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members arising from non-combat activities during peacetime. See *supra* note 158 and accompanying text.

180. *Brooks v. United States*, 337 U.S. 49, 51-52 (1949).

181. *Id.* at 51-52.

182. *Feres*, 340 U.S. at 141-44.

183. *Id.* at 141-43.

184. *Id.* at 141 (quoting 28 U.S.C. § 2674 (1946)).

185. *Id.*

186. *Id.* at 141-42.

187. *Id.* at 141. Specifically, the Court refused to "visit the Government with novel and unprecedented liabilities." *Id.* at 142. But see *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957) (stating that "the very purpose of the [FTCA] was to . . . establish novel and unprecedented governmental liability"). The Supreme Court soon realized that it had overstepped the bounds of judicial construction, and in later cases rejected the parallel private liability rationale as it applies to "uniquely governmental" functions. See *Berkovitz v. United States*, 486 U.S. 531, 539 (1988) (putting to rest the argument that the FTCA precludes liability for uniquely governmental functions); see also Note, *United States v. Johnson: Expansion of the Feres Doctrine to Include Servicemembers' FTCA Suits Against Civilian Government Employees*, 42 VAND. L. REV. 233, 240-41 (1989) [hereinafter Note, *Expansion of the Feres Doctrine*].

188. *Feres v. United States*, 340 U.S. 135, 142-44 (1950).

189. *Id.* at 142 (quoting 28 U.S.C. § 1346(b) (1946)).

190. 28 U.S.C. § 1346(b) (1946).

191. *Feres*, 340 U.S. at 142-43. It is difficult to understand, however, how barring all

As its third rationale for holding the FTCA inapplicable to claims by service members, the Court relied on the existence of other compensation schemes for injured military veterans.<sup>192</sup> In enacting the FTCA, Congress made no substitution of remedies. The Court found the absence of such a provision persuasive that "there was no awareness that the [FTCA] might be interpreted to permit recovery for injuries incident to military service."<sup>193</sup> The possibility of adequate compensation under existing military systems, similar to workers' compensation statutes, convinced the Court that allowing FTCA recovery for service members was not necessary.<sup>194</sup>

The *Feres* Court did not overrule its previous holding in *Brooks v. United States*,<sup>195</sup> instead it distinguished the two cases on their facts. The injury to the servicemen in *Brooks* occurred when they were on leave and not on active military duty. The *Brooks* Court held that the sole fact that the brothers were in the Army did not bar their claims, because the claims did not "arise out of or in the course of military duty." The *Feres*

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claims by service members is any more rational than allowing a claim to proceed under the law where the negligence occurred, as with any other FTCA claim.

The distinctively federal argument, though not rejected outright by the Court in later decisions, was later described as "no longer controlling," *United States v. Johnson*, 481 U.S. 691, 695 (1987) (Scalia, J., dissenting) (citing *United States v. Shearer*, 473 U.S. 52, 58 n.4 (1985)), and wholly abandoned in suits brought by federal prisoners. *United States v. Muniz*, 374 U.S. 150 (1963).

In *Muniz*, federal prisoners sued the government for injuries caused by the negligence of prison employees. The Court held that the FTCA did not bar the suits, and reasoned that while prisoners have no control over their geographical location and the governing local tort laws, to not allow any suits would be more prejudicial than a nonuniform right to recover. *Id.* at 162; *accord* *United States v. Johnson*, 481 U.S. 691, 695-96 (Scalia, J., dissenting) (A "nonuniform recovery cannot possibly be worse than (what *Feres* provides) uniform nonrecovery"). *But see infra* notes 206-214, 222 and accompanying text.

192. *Feres*, 340 U.S. at 144-45.

193. *Id.* at 144.

194. *Id.* at 145. For example, the Court noted that the widow in *Griggs* would receive \$22,000.00 from the government under a military compensation system, whereas she could only receive a maximum of \$15,000.00 under Illinois' wrongful death law. *Id.* The substitute compensation rationale, like the others relied on by the *Feres* Court, has been frequently criticized. *See* *United States v. Johnson*, 481 U.S. 681, 697-99 (1987) (Scalia, J., dissenting); *see also* *Brooks v. United States*, 337 U.S. 49 (1949). In *Brooks*, the Court rejected the argument that the existence of other service member benefits barred FTCA recovery. *Id.* at 53-54. Although the *Brooks* Court indicated that alternate compensation could reduce FTCA recovery, it declined to rule on the exclusivity or election of remedies. *Id.* at 53. The Court noted that, unlike workers' compensation statutes, neither the FTCA nor veterans' laws provide for exclusiveness of remedy. The Court could find no reason to forbid FTCA claims for service members, veterans or their dependents in the Act or its legislative history. *Id.* *But see infra* notes 206-214, 222 and accompanying text.

Subsequent to its decision in *Feres*, the Court in *United States v. Brown*, 348 U.S. 110 (1954) reiterated that the existence of alternate compensation did not bar a service member's claim under the FTCA. *Id.* at 113. For a further discussion of the *Brown* decision, *see infra* notes 198-204 and accompanying text.

195. 337 U.S. 49 (1949).



Court found this to be the "vital distinction."<sup>196</sup> The servicemen in *Brooks* were able to recover because their relationship to the Army while on leave was not "analogous to that of a soldier injured while performing duties under orders."<sup>197</sup>

### C. The Military Discipline Rationale

The most common justification offered in support of the *Feres* doctrine, the military discipline rationale—is found not in *Feres* itself, but in a later Supreme Court decision, *United States v. Brown*.<sup>198</sup> In *Brown*, a veteran alleged permanent injury to the nerves in his leg after a knee operation in a Veterans' Administration hospital after his discharge from the Army. The knee had been injured while the veteran was on active duty.<sup>199</sup> The Court concluded that *Brown* was governed by *Brooks*, and not by *Feres*, because the injury occurred after the veteran's discharge.<sup>200</sup> In distinguishing *Brown* from *Feres*, the Court stated that *Feres* is best explained by the "peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the [FTCA] were allowed for negligent orders given or negligent acts committed in the course of military duty. . . ."<sup>201</sup>

In allowing the veteran in *Brown* to maintain his FTCA suit, the Court did not back away from the *Feres* doctrine. Indeed, in dictum, the Court specifically endorsed the *Feres* distinction between injuries that do, and injuries that do not, arise out of or in the course of military duty.<sup>202</sup> The Court, however, distinguished the situation in *Brown* from that in *Feres* by characterizing the negligent act giving rise to the veteran's injury as not "incident to the military service."<sup>203</sup> Thus, according to the court, the original knee injury suffered by the plaintiff would be barred

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196. *Feres v. United States*, 340 U.S. 135, 146 (1950).

197. *Id.*

198. 348 U.S. 110 (1954).

199. *Id.* at 110-11. The veteran had received compensation under the Independent Offices Appropriation Act, 38 U.S.C. § 501(a) (1935), for both the original injury and injuries stemming from the allegedly negligent operation after his discharge. The district court dismissed the veteran's FTCA claim after concluding that his sole relief was under the Veterans' Act. The Second Circuit reversed. *Brown*, 209 F.2d 463 (2d Cir. 1954). The Supreme Court granted certiorari to resolve the question of whether *Brooks* or *Feres* was controlling. *United States v. Brown*, 348 U.S. 110, 111 (1954).

200. *Brown*, 348 U.S. at 112.

201. *Id.* (citing *Feres v. United States*, 340 U.S. 135, 141-43 (1950)). This rationale was never set forth explicitly by the Court in *Feres*. It was, however, explicitly adopted by *Jefferson v. United States*, 178 F.2d 518, 520 (4th Cir. 1949), *aff'd sub nom. Feres v. United States*, 340 U.S. 135 (1950), where the Fourth Circuit found it unreasonable to conclude that Congress intended that civil courts evaluate the propriety of military decisions and actions, and thereby impair military discipline by subjecting military command to public criticism. *Jefferson*, 178 F.2d at 520.

202. *Brown*, 348 U.S. at 113.

203. *Id.*

under *Feres* while the subsequent medical malpractice injury on the same knee would be allowed under *Brooks*.<sup>204</sup>

*D. The Supreme Court's Expansion of Feres: A Shift in Focus to the Military Discipline Rationale*

For almost thirty years after *Brown*, the Court did not rule on a FTCA military service claim, although it did address *Feres* on several occasions in dicta.<sup>205</sup> In 1977, the Court explicitly reaffirmed the underlying *Feres* doctrine in *Stencel Aero Engineering Corp. v. United States*,<sup>206</sup> a case involving a cross-claim in an indemnity action against the United States for injuries suffered by a National Guard officer after the ejection system in his fighter aircraft malfunctioned. The serviceman sued both the United States and the manufacturer of the ejection system. The manufacturer cross-claimed against the United States, alleging that any malfunction in the system was due to faulty government specifications and components.<sup>207</sup>

The Supreme Court held that the right of a third party to recover in an indemnity action against the United States, as recognized in *United States v. Yellow Cab*,<sup>208</sup> must be limited by the rationales of the *Feres* doctrine where the injured party is a service member.<sup>209</sup> In reaching its

204. *Id.* Justice Black, in dissent, called for the application of a "but for" test. According to Justice Black, the injury in the present case was inseparably related to military service because the veteran could not have been injured in the Veterans' Administration hospital "but for" his Army service and related injury. Thus, *Feres*, and not *Brooks*, should be controlling. In particular, Justice Black thought that veterans and soldiers should receive the same disability benefits for a hospital injury. Therefore, he concluded, "We have previously held, I think correctly, that a soldier injured in a hospital cannot also sue for damages under the [FTCA]. But the Court now holds that a veteran can." *Id.* at 114 (Black, J., dissenting) (citing *Feres v. United States*, 340 U.S. 135 (1950)).

205. See *Matinez v. Shrock*, 430 U.S. 920, 920-21 (1977) (White, J., dissenting from denial of certiorari); *United States v. Demko*, 385 U.S. 149, 152-53 (1966); *Richards v. United States*, 369 U.S. 1, 6-10 (1962).

206. 431 U.S. 666 (1977).

207. *Id.* at 668. The district court had dismissed the claim, holding that *Feres* barred the claim of the serviceman and that of the manufacturer. *Donham v. United States*, 395 F. Supp. 52 (E.D. Mo. 1975). The Eighth Circuit affirmed. *Donham v. United States*, 536 F.2d 765 (8th Cir. 1976). The Supreme Court granted certiorari to resolve the tension between the *Feres* doctrine and the indemnity principles of *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951). See *Stencel*, 431 U.S. at 670.

In *Yellow Cab*, the Court held that the FTCA permits third-party impleader against the government, under a theory of indemnity or contribution, if the original defendant claims that the United States was wholly or partially responsible for the plaintiff's injury. *Yellow Cab*, 340 U.S. at 553. Thus, in *Stencel*, the Court was faced with a conflict between well-established indemnity principles under the FTCA and the equally well-established *Feres* doctrine. The specific issue addressed by the *Stencel* Court was whether a private defendant could seek indemnification from the United States under the FTCA when a service member has brought a tort action against that defendant. *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 670 (1977).

208. 340 U.S. 543 (1951); see also *supra* note 207.

209. *Stencel*, 431 U.S. at 673-74.

decision, the Court applied two of the rationales it enunciated in *Feres* and the military discipline rationale first enunciated in *Brown*.<sup>210</sup> First, the Court noted that the distinctively federal relationship between the government and members of the armed forces applies equally to the relationship between the government and its military suppliers and contractors.<sup>211</sup> Second, while the Court acknowledged that the military compensation scheme, which prevents service members from recovery under the FTCA, provides no relief to a third party, the Court nonetheless held that where the Veterans' Benefits Act<sup>212</sup> provides an upper limit of liability for service-connected injuries, the FTCA cannot be used to circumvent that limitation by indemnity claims.<sup>213</sup> Finally, the Court concluded that "where the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party."<sup>214</sup>

With the Court's decision in *Stencel*, the military discipline rationale became a dominant theme in cases decided by the Burger Court. Chief Justice Burger, writing for the majority in *Chappell v. Wallace*,<sup>215</sup> further expanded the scope of the *Feres* doctrine by holding that enlisted military personnel may not recover damages from a superior officer for alleged constitutional violations because of the need for special regulations in relation to military discipline.<sup>216</sup> The Court's analysis focused on "the peculiar and special relationship of the soldier to his superiors," and the unique structure of the military establishment.<sup>217</sup> Noting that "no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting," the Court cautioned that "[c]ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the Court to tamper with the established relationship between enlisted military personnel and their superior officers."<sup>218</sup> Relying on *Feres* and a longstanding history of deferring to Congress' authority over military affairs, the Court declined to extend its prior decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*<sup>219</sup> to claims by enlisted military personnel because of the intrusion upon military discipline and authority such claims might

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210. See *supra* notes 188-194, 201 and accompanying text.

211. *Stencel*, 431 U.S. at 672.

212. Public L. No. 85-857, § 1, 72 Stat. 1105 (codified as amended at 38 U.S.C. §§ 1-1-5228 (1982 & Supp. III 1985)).

213. *Stencel*, 431 U.S. at 673.

214. *Id.*

215. 462 U.S. 296 (1983).

216. *Id.* at 305.

217. *Id.* at 300.

218. *Id.*

219. 403 U.S. 388 (1971). In *Bivens*, the Court had authorized suits for damages against federal officials whose actions violated an individual's constitutional rights, even where Congress had not expressly authorized such suits. *Id.* at 397; see also *supra* note 11, and *infra* note 245.

have.<sup>220</sup>

The military discipline rationale, which was not one of the three rationales the Court relied on in *Feres*,<sup>221</sup> has been repeatedly and almost mindlessly applied to bar service member claims under the FTCA, even as the original *Feres* rationales have been rejected by both the Supreme Court and lower courts.<sup>222</sup> The shift in focus to the military discipline rationale has resulted in a mechanistic rejection of service members' FTCA claims on the ground that military discipline might be impaired if the claims were allowed to go forward. The prospect of service members "second-guessing" military orders, and the possibility of military personnel testifying in court as to each other's decisions and actions,<sup>223</sup> has led courts to dismiss claims even where there is no logical or rational connection between military discipline and the alleged injury.<sup>224</sup>

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220. *Chappell*, 462 U.S. at 300-05. According to Chief Justice Burger:

The special status of the military has required, the Constitution has contemplated, Congress has created, and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel. The special nature of military life—the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel—would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command.

*Id.* at 303-04 (citation omitted).

221. For a discussion of the three original *Feres* rationales, see *supra* notes 182-194 and accompanying text. See also Note, *Rethinking "Incident to Service" Analysis*, *supra* note 159, at 181-82 (1988).

222. See *supra* notes 191-194 and accompanying text. The parallel private liability rationale was rejected by the Supreme Court in both *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957) and *Indian Towing Co. v. United States*, 350 U.S. 61, 66-69 (1955). The distinctively federal rationale was rejected by the Court in *United States v. Muniz*, 374 U.S. 150, 161 (1963). The third *Feres* rationale, the uniform compensation rationale, had been largely ignored by both the Supreme Court and lower courts since the *Brown* decision, where a serviceman was permitted to recover under the FTCA even though veterans' benefits were available to him. *United States v. Brown*, 348 U.S. 110, 113 (1959); see also Note, *Expansion of the Feres Doctrine*, *supra* note 187, at 242.

Although the Supreme Court seemed to have abandoned those rationales after *Feres* was decided, the Court resurrected the distinctively federal rationale and the uniform compensation rationale in *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 671 (1977). According to one commentator, many lower courts and commentators "questioned the continued viability of *Feres* when military discipline was not at stake" before *Stencel* was decided. See Note, *Expansion of the Feres Doctrine*, *supra* note 187, at 243. Afterward, lower courts again gave weight to the original *Feres* rationales and summarily denied recovery to servicemen. *Id.*

223. *Stencel*, 431 U.S. at 673.

224. This is particularly true of military medical malpractice cases, in which military discipline is not a compelling issue. See, e.g., *Major v. United States*, 835 F.2d 641, 644-45 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 2871 (1988) ("In recent years the [Supreme] Court has embarked on a course dedicated to broadening the *Feres* doctrine to encompass, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military, without regard to . . . any nexus between the injury-producing event and the essential defense/combat purpose of the military activity from which it arose.") (empha-

*E. Recent Expansion of the Feres Doctrine: A Return to "Incident to Service" Analysis*

The *Feres* doctrine, in its broadest form, would appear to preclude all tort claims by service members against the federal government. In its most narrow form, the rule would seem to preclude only those claims by active duty service members which genuinely implicate military discipline. Since 1950, the Supreme Court and lower federal courts have struggled, without much success, to more precisely define the limits of the doctrine.

In *United States v. Shearer*,<sup>225</sup> the Court considered a wrongful death claim brought by the mother of an army private who was murdered by a fellow service member while off-base and off duty. The Third Circuit ruled that *Feres* did not bar recovery because the decedent, unlike the claimants in *Feres*, was on leave at the time of his death.<sup>226</sup> In reversing the Third Circuit, the Supreme Court proclaimed that the *Feres* doctrine "cannot be reduced to a few bright-line rules," and that each case must be decided individually.<sup>227</sup> Despite the fact that the decedent was off-duty and off-base at the time of his murder, the Court held that the claim was barred because the suit required a "civilian court to second-guess military decisions,"<sup>228</sup> and called "into question basic choices

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sis in original). For additional examples, see Schwartz, *A Proposed Reform of the Feres Doctrine*, *supra* note 159, at 1003-10.

225. 473 U.S. 52 (1985).

226. *Shearer v. United States*, 723 F.2d 1102 (3d Cir. 1983). The District Court for the Eastern District of Pennsylvania had dismissed the claim under the *Feres* doctrine. *Shearer*, 576 F. Supp. 672 (E.D. Pa. 1982).

227. 473 U.S. 52, 57 (1985).

228. *Id.* The Court reasoned that the possibility of impaired military discipline and effectiveness outweighed the fact that the murder had taken place while the soldier was off-duty and off-base. *Id.*

In the confusion following *Brooks*, *Feres*, and *Brown*, lower courts unnecessarily expanded the *Feres* doctrine by relying on overly-restrictive tests such as off-base/on-base or off-duty/on-duty distinctions. Compare *Preferred Ins. Co. v. United States*, 222 F.2d 942, 948 (9th Cir.) (recovery denied for injuries sustained when plane fell on serviceman's home located on-base), *cert. denied*, 350 U.S. 837 (1955) with *Sapp v. United States*, 153 F. Supp. 496, 498 (W.D. La. 1957) (recovery permitted for injuries sustained when plane fell on serviceman's off-base home); see also *Hass v. United States*, 518 F.2d 1138, 1140 (4th Cir. 1975) (recovery denied to off-duty serviceman injured while riding a horse rented from Marine Corps stable); *Chambers v. United States*, 357 F.2d 224, 229 (8th Cir. 1966) (recovery denied where serviceman drowned while swimming recreationally in base pool).

In *Miller v. United States*, 643 F.2d 481 (8th Cir. 1980), the Eighth Circuit surveyed other Circuit decisions and found that courts barred service members' claims if, at the time of injury, the service member was on a military base, on active duty status, under compulsion of military orders or engaged in an activity that is a privilege related to or dependent upon military status. *Id.* at 483. Under such a restrictive analysis, the presence of any one of the four factors barred recovery. The only factual scenarios permitting recovery would be for an injury off-duty and off-base, the situation in *Brooks v. United States*, 337 U.S. 49 (1949), but rejected in

about the discipline, supervision, and control of a serviceman."<sup>229</sup>

*Shearer* contains conflicting messages for those anxious to see a relaxation of the *Feres* doctrine. The optimists among us take comfort in the Court's statement that there are no hard and fast rules to ascertain the reach of *Feres* and that a case-by-case analysis is necessary. This language leaves room for the argument that *Feres* should be applied only where issues of military command are implicated.<sup>230</sup> For the pessimists, however, *Shearer* represents an expansion of the *Feres* doctrine, precluding not only claims like those brought in *Feres* (claims for injuries sustained by active duty personnel), but also precluding claims for injuries sustained by service members on leave or after discharge, a class of claims not addressed by *Feres*, and specifically allowed in *Brooks* and *Brown*.<sup>231</sup>

In 1987, the Supreme Court confronted the *Feres* doctrine on two occasions.<sup>232</sup> Significantly, both cases were decided by a five-four majority. In the first case, *United States v. Johnson*,<sup>233</sup> the widow of a Coast Guard helicopter pilot alleged negligence on the part of civilian employees of the Federal Aviation Administration in providing radar control to the pilot during a rescue mission. The Eleventh Circuit ruled that *Feres*

*Shearer v. United States*, 473 U.S. 52 (1985), or for injury after discharge, the situation in *United States v. Brown*, 348 U.S. 110 (1954).

Other courts have applied the even more restrictive "but-for" test to deny recovery: if an injury would not have occurred but-for the plaintiff's status as a service member, the claim is barred. See, e.g., *Schwager v. United States*, 326 F. Supp. 1081, 1086 (E.D. Pa. 1971) (government not liable under FTCA for injuries arising out of conduct incident to military service even when illness first manifested at home while on leave). The Supreme Court explicitly rejected a strict but-for test in *Brooks v. United States*, 337 U.S. 49, 51 (1949). But see Justice Black's dissent in *United States v. Brown*, 348 U.S. 110, 114 (Black, J., dissenting).

229. *Shearer*, 473 U.S. at 58. Although the complaint alleged negligence by the Army in making a "straightforward personnel decision," the Court refused to let the soldier's widow "escape the *Feres* net" by recharacterizing what the Court termed a management "decision of command." *Id.* at 59.

The Court acknowledged that the soldier who was convicted of *Shearer's* murder had previously been convicted of manslaughter while at an Army base in Germany before being transferred to Fort Bliss. Nonetheless, the Court dismissed the claim, which alleged that the Army negligently failed to control and warn others of a soldier it knew to be dangerous, because it feared that allowing such suits would expose commanding officers to civilian review of military and disciplinary decisions. *Id.* at 58.

230. See *Atkinson v. United States*, 804 F.2d 561, 563 (9th Cir. 1986) (recovery allowed for medical malpractice claim which did not affect military discipline and therefore was not incident to service), *withdrawn*, 825 F.2d 202 (9th Cir. 1987) (reinstatement of *per se* denial of recovery to serviceman for military medical malpractice following Supreme Court decision in *United States v. Johnson*, 481 U.S. 681 (1987)).

231. But cf. *Brooks v. United States*, 337 U.S. 49 (1949) (off-duty serviceman hit by military vehicle not barred by *Feres* doctrine from recovery under FTCA); *Brown v. United States*, 348 U.S. 110 (1954) (veteran allowed to recover for military medical malpractice which took place after discharge).

232. *United States v. Johnson*, 481 U.S. 681 (1987); *United States v. Stanley*, 483 U.S. 669 (1987).

233. 481 U.S. 681 (1987).

was inapplicable because the suit alleged negligence on the part of civilian government employees and not on the part of military personnel, and thus did not implicate issues of military discipline or the like.<sup>234</sup>

The Supreme Court, in an opinion written by Justice Powell, reversed the Eleventh Circuit, holding that the pilot's death arose out of an activity directly related to his military service and, therefore, the claim was barred by the *Feres* doctrine.<sup>235</sup> As a rationale, Justice Powell offered only that a claim arising out of "service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission,"<sup>236</sup> even where the military judgments and decisions do not form the basis for the claim. Widening further the military discipline rationale, Justice Powell asserted that "military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's country."<sup>237</sup>

In *Johnson*, the Court broadened the military discipline rationale and shifted the focus back to the original *Feres* emphasis on whether a service member's claim is "incident to service." Once again, however, the Court did not adequately define that phrase. Moreover, the Court's resurrection of the original *Feres* rationales,<sup>238</sup> although not explicitly overruling the *Shearer* military discipline analysis, undoubtedly will lead to confusion among lower courts.<sup>239</sup>

Justice Scalia, joined by three other justices in dissent, railed bitterly against the injustice of *Feres* and indicated that he would be willing to overrule the doctrine outright in the proper case.<sup>240</sup> He further advocated a rule that would confine *Feres* to FTCA suits alleging military negligence.<sup>241</sup>

*Johnson*, like *Shearer*, contains two conflicting messages regarding the scope and continued vitality of the *Feres* doctrine. On the one hand, the opinion suggests that claims by service members will be barred even where such claims have a tenuous impact upon the so-called "military

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234. *Johnson v. United States*, 749 F.2d 1530, 1539 (11th Cir. 1985), *aff'd on rehearing*, 779 F.2d 1492 (11th Cir. 1986).

235. *Johnson*, 481 U.S. at 691-92. In "declin[ing] to modify the [*Feres*] doctrine at this late date," Justice Powell relied on the fact that the Court had never "deviated" from the doctrine, and that Congress, despite the fact that it could have remedied the *Feres* doctrine if the Court had misinterpreted its intent by focusing on whether service members' injuries are "incident to service," had not "changed this standard in the close to 40 years since it was articulated." *Id.* at 686-88.

236. *Id.* at 691.

237. *Id.*

238. See *supra* notes 182-194 and accompanying text.

239. See *supra* note 228 and accompanying text.

240. *United States v. Johnson*, 481 U.S. 681, 703 (1987) (Scalia, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.). Justice Scalia forcefully observed that "*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." *Id.* at 700 (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 1242, 1246 (E.D.N.Y.), *appeal dismissed*, 745 F.2d 161 (2d Cir. 1984)).

241. *Id.*

mission.”<sup>242</sup> On the other hand, the doctrine’s longevity may be in question, given the length and fervor of Justice Scalia’s dissent, that three other Justices shared his position, and that now-retired Justice Powell authored the Court’s majority opinion.

In the second 1987 case, *United States v. Stanley*,<sup>243</sup> the Supreme Court again affirmed and expanded the *Feres* doctrine. *Stanley* involved a FTCA claim by a former serviceman against the government for injuries sustained as a consequence of being given a hallucinogenic drug in a government study without his knowledge or consent.<sup>244</sup> The Court’s opinion, authored by Justice Scalia, rejected the plaintiff’s claim on the authority of *Feres*, because the claimant’s injuries arose out of an activity directly related to his military service.<sup>245</sup>

Significantly, however, Justice O’Connor, who was a member of the majority in *Johnson*, wrote a dissenting opinion in *Stanley* in which she stated that the government’s conduct was “so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission.”<sup>246</sup> As indicated from her dissent, Justice O’Connor appears willing to recognize that there are some injuries sus-

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242. See, e.g., *Appelhans v. United States*, 877 F.2d 309 (4th Cir. 1989). In *Appelhans*, an Army service member on indefinite excess leave pending review of his court-martial sentence was later formally discharged. After his discharge, he filed a medical malpractice claim against the government, alleging negligent failure to diagnose and treat a medical condition for which he had sought treatment at an Army hospital while on excess leave. The District Court for the Eastern District of Virginia dismissed his claim on the ground that it was barred by *Feres* and its progeny. *Id.* at 310.

The Fourth Circuit affirmed, holding that medical treatment at a military hospital is “incident to service” and malpractice claims are thus barred by the *Feres* doctrine. *Id.* at 313. While the court acknowledged that “the *Feres* doctrine is not without critics,” and may produce “undeniably harsh results,” it felt bound by the *Johnson* Court’s revitalization of the military discipline rationale and the original *Feres* rationales. *Id.* at 313. Thus, the court rejected Appelhans’ contention that his relationship to the Army’s “military mission” while on excess leave was too remote and tenuous to fall under the general principles of *Feres* and *Johnson*. *Id.* at 312-13.

243. 483 U.S. 669 (1987).

244. The drug had been given to the claimant in connection with a 1958 study performed at the Aberdeen Proving Grounds in Maryland. The sole purpose of the study was to ascertain the effect of the drug on humans. Thus, the claimant was literally used as a human guinea pig in the government study. He did not learn of the drug administration until 17 years later, when he received a letter soliciting his cooperation in a study on the long-term effects of LSD. At that point, he filed his claims against the government. *Id.* at 671-72.

245. The claimant filed claims against the government under the FTCA and on the *Bivens* theory. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) recognized a cause of action for violation of constitutional rights against federal officials even in the absence of a statute authorizing such relief. The FTCA claim was dismissed and never was considered by the Supreme Court on its merits. The Court, however, held that the exception to the FTCA established by *Feres* is as extensive as the abstention required by federal courts in the face of a *Bivens* claim. Thus, *Feres* and its progeny are directly controlling in the *Bivens* context. *United States v. Stanley*, 483 U.S. 669, 680-81 (1987).

246. *Stanley*, 483 U.S. at 709 (O’Connor, J., dissenting).



tained by active duty military personnel at the hands of other government employees which neither "arise out of," nor are "incident to," military service.

In light of these recent decisions, one can envision a coalition composed of Justice Scalia, Justice O'Connor, and the three Justices who dissented in both *Johnson* and *Stanley*—Justices Brennan, Marshall, and Stevens—willing to restrict the *Feres* doctrine in the appropriate case. Thus, serious consideration should be given to pressing meritorious claims on behalf of injured service members, even where such claims, at first blush, appear barred by the *Feres* doctrine.

#### F. Conclusion

The FTCA was enacted in 1946, shortly after the end of the World War II. Although Congress waived sovereign immunity for many tort claims previously barred, it chose to retain immunity for claims arising out of military combat activities during times of war. Given the fact that nearly one million American military personnel were killed or wounded during World War II,<sup>247</sup> the explicit exception for injuries arising from combat activities is understandable. The Supreme Court's expansion of that exception under the *Feres* doctrine, however, is neither understandable nor appropriate.

The Supreme Court's recent expansion of the *Feres* doctrine in *Johnson* and *Stanley* now appears to afford the government absolute immunity from suits by service members.<sup>248</sup> This apparent grant of absolute immunity contradicts the basic intent and policies underlying the congressional waiver of sovereign immunity under the FTCA. The Court's expansion of Section 2680(j) of the FTCA—the combatant exception—to any claim brought by a service member is outside the scope of Congress' initial intent. Indeed, criticism of the *Feres* doctrine in its current form is nearly universal.<sup>249</sup> Lower court dissatisfaction with both *Feres* and its successors will lead to an ever-conflicting array of cases. Thus, to reduce confusion and to uphold the original intent of Congress, the Supreme Court should severely restrict *Feres*, or overrule the *Feres* doctrine entirely.

### V. CLAIMS ARISING OUT OF THE EXERCISE OF A DISCRETIONARY FUNCTION

When Congress waived federal sovereign immunity from suits for injuries caused by the negligence of government agents, officials or employees, it explicitly reserved immunity for certain claims. One such res-

247. Between 1939 and 1945, 292,131 service members were killed and 671,278 military personnel were wounded. R. GORALSKI, *WORLD WAR II ALMANAC: 1931-1945* 428 (1984 ed.).

248. See *supra* notes 232-246 and accompanying text.

249. See *supra* note 240.

ervation, considered by many to be the most important,<sup>250</sup> is the discretionary function exception.<sup>251</sup> The rule that immunity is retained for claims arising out of the performance of a discretionary function is easily stated but difficult to apply. The Supreme Court has not set clear standards for differentiating between immune "discretionary" acts and acts which involve the exercise of discretion but are not immune.<sup>252</sup> Indeed, the Court has observed that it is virtually "impossible to define with precision every contour of the discretionary function exception."<sup>253</sup> Consequently, the various circuits have taken conflicting approaches in resolving discretionary function claims.<sup>254</sup> Thus, whether a government employee's act or omission involves the exercise of discretion depends more upon the jurisdiction in which a suit is filed than upon the facts of the particular case.

*A. The Lack of a Definition of "Discretionary Function" under Dalehite v. United States*

In its first consideration of the discretionary function exception, the Supreme Court in *Dalehite v. United States*<sup>255</sup> found it unnecessary to define precisely the parameters of governmental activity characterized as "discretionary."<sup>256</sup> Instead, the Court focused on whether the acts of the

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250. See H.R. REP. NO. 2245, 77th Cong., 2d Sess. 1, 10 (1942) (calling the discretionary function exception a "highly important exception"); see also Schwartz & Mahshigian, *In the 1990's the Government Must Be a Reasonable Person in Its Workplaces: The Discretionary Function Immunity Shield Must Be Trimmed*, 46 WASH. & LEE L. REV. 359, 360 (1989) (calling the discretionary function exception "the most important of the exclusions [and] also the most amorphous").

251. 28 U.S.C. § 2680(a) (1982). Section 2680(a) provides that sovereign immunity is not waived for

[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

*Id.*

252. See, e.g., *Dalehite v. United States*, 346 U.S. 15 (1953), where the Court first discussed the discretionary function exception, but failed to set forth a definitive test for application of the exception.

253. *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984).

254. Compare *Allen v. United States*, 816 F.2d 1417, 1424 (10th Cir. 1987) (dismissing claims brought by residents of Utah for injuries arising out of government's failure to monitor and provide public information on radioactive fallout during nuclear testing in the 1950s and 1960s, because the government's planning and implementing activities involved policy judgment), *cert. denied*, 484 U.S. 1004 (1988) with *Starrett v. United States*, 847 F.2d 539, 542 (9th Cir. 1988) (allowing claim alleging well water contamination by chemicals from an adjoining naval base because the failure to follow legislative and presidential guidelines for "secondary treatment" of waste waters from federal facilities is not a discretionary act).

255. 346 U.S. 15 (1953).

256. *Id.* at 35.

federal officials and employees involved "policy judgment and decision," and whether those decisions were made at a planning or operational level.<sup>257</sup>

*Dalehite* was a test case representing over 300 separate claims totaling more than 200 million dollars. The claims arose from an explosion and fire that destroyed Texas City, Texas. Although the cause of the fire was unknown, the source of the explosions and fire was a highly flammable government-manufactured fertilizer. The fertilizer was produced, distributed, and was about to be shipped, by the government as part of a foreign aid program after World War II.<sup>258</sup> After manufacturing and packaging the fertilizer, the government shipped the fertilizer to Texas City, where it was loaded onto French steamships heading for Europe. Although the fertilizer contained an ingredient used for explosives and was known by the government to be dangerous, the fertilizer was coated in a flammable substance, placed in easily ignitable paper bags, and inadequately labeled as flammable. The fertilizer was loaded next to a cargo of explosives; the fertilizer ignited and caused the cargo to explode.<sup>259</sup>

Plaintiffs injured by the explosion sued the United States government for negligently manufacturing and distributing a highly flammable material without adequate warning.<sup>260</sup> The Court held that the discretionary function exception barred every claim of negligent action or decision making by the government in creating or implementing the fertilizer program.<sup>261</sup> In reaching its decision, the Court began by examining the legislative history and basic jurisprudential principles behind the FTCA and its waiver of sovereign immunity.<sup>262</sup>

The Court acknowledged that the motivation and legislative purpose in enacting the FTCA was to allow suits against the government previously barred by sovereign immunity for negligent acts or omissions of government agents or employees.<sup>263</sup> The Court noted, however, that while it was bound to give the Act a construction consistent with that purpose, it was also obligated to give "due regard for the statutory exceptions to that policy."<sup>264</sup> According to the Court, the discretionary func-

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257. *Id.* at 35-36.

258. *Id.* at 19. The foreign aid plan was the government's solution to the problem of feeding the people of Germany, Japan, and Korea during post-war United States occupation. The plan had been ordered by the Office of War Mobilization and Reconversion, approved by the Cabinet, provided with funds by the War Department, and administered by the Field Director of Ammunition Plants. *Id.* at 20.

259. *Id.* at 17-23.

260. *Dalehite*, 346 U.S. at 23. The district court accepted the plaintiffs' theory, after finding that a number of negligent acts by the government proximately caused their injuries. The Fifth Circuit reversed and rendered judgment for the United States. *In re Texas City Disaster Litig.*, 197 F.2d 771 (5th Cir. 1952). The Supreme Court granted certiorari because the case "presented an important problem of federal statutory interpretation." *Dalehite*, 346 U.S. at 17.

261. *Id.* at 42.

262. *Id.* at 24-30.

263. *Id.* at 31.

264. *Id.*

tion exception was enacted to protect governmental decision making and policy judgments from "second guessing" by the courts.<sup>265</sup> In the Court's view, Congress agreed to waive government immunity for such acts as the negligent operation of a vehicle, but did not consent to suit for governmental activities involving some measure of discretion or judgment, such as that involved in the fertilizer program.<sup>266</sup>

Again, the Court found it "unnecessary to define. . . precisely where discretion ends."<sup>267</sup> Rather, the Court found it sufficient to hold that

the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. *Where there is room for policy judgment and decision there is discretion.* It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official direction cannot be actionable. If it were not so, the protection of 2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior exercising, perhaps abusing, discretion.<sup>268</sup>

In the years following the Court's broad and sweeping proclamation that "[w]here there is room for policy judgment and decision there is discretion," lower courts were faced with the dilemma of either barring every claim involving some element of choice by a government employee, or manipulating the *Dalehite* planning/operational distinction to hold that some claims were not barred.<sup>269</sup>

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265. *Id.* at 28-30. In support of its interpretation, the Court referred to an oft-quoted paragraph of the House Report of the 77th Congress that adopted the discretionary function exception. The paragraph provides that the discretionary function exception

is a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity . . . where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid. . . . The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion.

*Id.* at 29 n.21 (quoting H.R. REP. NO. 2245, 77th Cong., 2d Sess. 1, 10 (1942)).

266. *Id.* at 34.

267. *Id.* at 35.

268. *Id.* at 35-36 (emphasis supplied) (footnote omitted).

269. See, e.g., *Jablonski v. United States*, 712 F.2d 391, 396 (9th Cir. 1983) (failure of government psychiatrist to warn foreseeable victim of violent tendencies of mental patients is operational act, not discretionary act involving planning); *Nevin v. United States*, 696 F.2d 1229, 1230-31 (9th Cir.) (decision by chief chemical officer authorizing biological warfare vulnerability test was made at planning level and,

*B. The "Planning/Operational" Distinction*

The test enunciated by the majority in *Dalehite* to determine whether a governmental act or omission falls within the discretionary function exception focused on whether the decisions were made at a planning or operational level. Obviously, all acts involve some elements of choice or decision. For example, in deciding to meet its obligations during the occupation of Europe by shipping fertilizer, the government made decisions ranging from converting artillery plants to fertilizer plants, to deciding whether paper is a suitable material for bagging hot fertilizer, to how the bags should be labelled. According to the Court, all of the allegedly negligent acts took place at the planning level, and thus were protected by the discretionary function exception.<sup>270</sup>

In a dissenting opinion, Justice Jackson criticized the majority's focus on who exercised the discretion and whether an act is discretionary.<sup>271</sup> In Justice Jackson's view, "[t]he statute itself contains not the vaguest intimation of such a test which leaves actionable only the misconduct of file clerks and truck drivers."<sup>272</sup> The key issue is not whether the person making a decision is at a "high-altitude," but whether the act involved is an exertion of governmental authority, or balancing of "care against cost, of safety against production, of warning against silence."<sup>273</sup>

The dissent found that the government's negligence in manufacturing and shipping the fertilizer did not involve "policy decisions of a regulatory or governmental nature, but involved actions akin to those of a private manufacturer, contractor, or shipper."<sup>274</sup> Justice Jackson therefore reasoned that, where government officials performed activities of a "housekeeping" nature, there is "no good reason to stretch the legislative text to immunize the government or its officers from responsibility for their acts. . . ."<sup>275</sup>

*C. Between Dalehite and Varig*

For the next thirty years, the debate between the majority and dissenting opinions in *Dalehite* was reflected in lower court decisions. Some courts, struggling with the planning/operational distinction, found solace in the decisions of the Supreme Court in *Indian Towing Co. v. United*

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therefore, decision to use strain of bacterium resulting in the death of plaintiff was discretionary function), *cert. denied*, 464 U.S. 815 (1983); *Doyle v. United States*, 530 F.Supp. 1278, 1283-84 (C.D. Ca. 1982) (discretionary function exception insulates any high level policy judgments from FTCA liability, but where decision occurs at operational level of government, exception provides no protection although discretion and judgment may in fact have been exercised).

270. *Dalehite*, 346 U.S. at 42.

271. *Id.* at 58 (Jackson, J., dissenting).

272. *Id.* n.12.

273. *Id.* at 57-58.

274. *Id.* at 60.

275. *Id.*

*States*,<sup>276</sup> and *Rayonier, Inc. v. United States*.<sup>277</sup> In *Indian Towing*, a tugboat ran aground when a Coast Guard operated lighthouse failed to function, causing damage to the cargo on the barge it was towing. The tugboat's owners sued the government for failing to check and repair the light or give warning that the light was not operating.<sup>278</sup> In *Rayonier*, a forest fire which started on government land and spread to adjacent private property destroyed timber and buildings belonging to the plaintiffs. The property owners sued the government for the negligence of the United States Forest Services in failing to properly fight the forest fire and in allowing flammable materials to accumulate on government land.<sup>279</sup>

In both *Indian Towing* and *Rayonier* the government did not assert that the discretionary function exception barred the claims; rather, the government argued that it was not liable for negligence arising from "uniquely governmental functions."<sup>280</sup> Thus, the Court was not presented with the opportunity to reconsider the interpretation of the discretionary function exception set out in *Dalehite*. Dicta in both cases, however, indicates a limitation on the *Dalehite* decision. In *Indian Towing*, the Court, after finding *Dalehite* inapplicable, observed that the "broad and just purpose which the [FTCA] was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like . . . those in which a private person would be liable. . . ." <sup>281</sup> The *Rayonier* Court acknowledged the heavy burden that may be imposed upon the public treasury if the government is held responsible for the negligence of its employees and agencies. The Court, however, rejected consideration of such a factor in the face of obvious congressional intent in passing the FTCA.<sup>282</sup> Moreover, the Court suggested that, "[t]o the extent that there was anything to the contrary in the *Dalehite* case it was necessarily rejected by *Indian Towing*."<sup>283</sup> Finally, the Court cautioned that "[t]here is no justification for this Court to read exemptions into the [FTCA] beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it."<sup>284</sup> Those broad policy pronouncements, however, did not end the debate over the scope of the discretionary functions exception.

#### D. *Varig and the Return of Dalehite*

Following the Supreme Court's decisions in *Indian Towing* and

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276. 350 U.S. 61 (1955).

277. 352 U.S. 315 (1957).

278. *Indian Towing*, 350 U.S. at 62.

279. *Rayonier*, 352 U.S. at 315-16.

280. *Rayonier*, 352 U.S. at 319; *Indian Towing*, 350 U.S. at 64.

281. *Indian Towing*, 350 U.S. at 68.

282. *Rayonier*, 352 U.S. at 319-20. The Court noted that Congress, after long consideration, had seen fit to impose such liability on the United States. *Id.*

283. *Id.* at 319 (footnote omitted).

284. *Id.* at 320 (footnote omitted).

*Rayonier*, the validity of *Dalehite* was questioned by courts and commentators.<sup>285</sup> Believing the *Dalehite* Court had overbroadly interpreted the discretionary function exception, courts sought to narrow its application.<sup>286</sup> In 1984, however, the Court reaffirmed *Dalehite* in no uncertain terms in *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*.<sup>287</sup> Responding to the claim that cases such as *Indian Towing* had "eroded, if not overruled" *Dalehite*, the Court flatly rejected the "supposition that *Dalehite* no longer represents a valid interpretation of the discretionary function exception."<sup>288</sup>

In *Varig*, the Court reviewed two cases involving negligence by the Federal Aviation Administration (FAA) in certifying commercial aircraft. In both cases, aircraft certified by the FAA as airworthy caught fire mid-air when non-regulation equipment failed to operate or was missing. The FAA had not inspected the aircraft itself; instead, the FAA had delegated inspection responsibility to aircraft manufacturers and implemented a "spot-check" program to ensure manufacturer compliance with FAA safety regulations. The plaintiffs alleged that the FAA was negligent in delegating inspection responsibilities, implementing the spot-check program, and issuing airworthiness certificates to the two aircraft even though they had not met existing fire protection standards.<sup>289</sup>

The Court held that the discretionary function exception immunized the FAA from tort liability for all three negligent acts.<sup>290</sup> The Court held that the exception protected both the FAA officials who designed the system of compliance review and the employees who carried out the "spot-check" program in accordance with agency directives.<sup>291</sup> The Court reasoned that the FAA is a government regulatory agency which merely polices aircraft manufacturers by monitoring their compliance with FAA regulations. The Court noted that the development, implementation, and execution of a "spot-check" program is exactly the sort of discretionary governmental function Section 2680(a) was designed to protect from judicial "second-guessing,"<sup>292</sup> and without such protection,

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285. See, e.g., *Lindgren v. United States*, 665 F.2d 978, 980 (9th Cir. 1982) ("Although *Dalehite* remains an important statement of the policy behind the discretionary function exemption, subsequent decisions by the Supreme Court and various circuit courts have operated to narrow *Dalehite*'s definition of the term 'discretion.'"); see also Fishback & Killefer, *The Discretionary Function Exception to the Federal Tort Claims Act: Dalehite to Varig to Berkovitz*, 25 IDAHO L. REV. 291, 296-97 (1988-89) [hereinafter Fishback & Killefer, *Discretionary Function*].

286. *Downs v. United States*, 522 F.2d 990, 995-98 (6th Cir. 1975) (mere exercise of judgment does not insulate government from liability for its employees' torts; only those activities which entail formulation of governmental policy are protected); see also Fishback & Killefer, *Discretionary Function*, *supra* note 285, at 296.

287. 467 U.S. 797 (1984).

288. *Id.* at 811-12.

289. *Id.* at 801-03.

290. *Id.* at 815-16.

291. *Id.* at 819-20.

292. *Id.* at 814-15.

efficient government operations would be seriously hampered.<sup>293</sup>

The Court pointed to the legislative history of Section 2680(a) in support of its decision. Like the *Dalehite* Court, the *Varig* Court found persuasive the House Report which stated that "claims against Federal agencies growing out of their regulatory activities" are clearly exempted from the waiver of sovereign immunity.<sup>294</sup> Additionally, the Court reasoned that protecting regulatory activities from suit upholds Congress' underlying purpose in enacting the discretionary function exception. "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."<sup>295</sup> Thus, while the Court acknowledged that its interpretation of the FTCA and the discretionary function exception had not "followed a straight line," the Court chose to reaffirm its prior interpretation of Section 2680(a) in *Dalehite*.<sup>296</sup>

As in *Dalehite*, the *Varig* Court stressed the importance of the discretionary function exception in marking the boundary between Congress' desire to waive immunity when governmental wrongs cause injury, and its desire to protect the government when those wrongs are the result of policy decisions, no matter how misbegotten or negligent.<sup>297</sup> In addition, as in *Dalehite*, the Court found it "unnecessary—and indeed impossible—to define with precision every contour of the discretionary function exception."<sup>298</sup>

Although the Court was unwilling, and seemingly unable, to define the parameters of government activity that is discretionary, it did lay out two factors to guide lower courts. First, "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case."<sup>299</sup> Thus, the exception protects all government employees, whatever their rank or job, if their acts are of "the nature and quality that Congress intended to shield from tort liability."<sup>300</sup> According to the Court, determining whether an employee's acts are the kind to trigger the exception should be the basis of a court's inquiry.<sup>301</sup> Unfortunately, the Court provided little guidance in how to get beyond the semantics to answer that question. Second, at a minimum, the exception immunizes the "discretionary acts of the government acting in its role as a regulator of the conduct of private individuals."<sup>302</sup> As the Court asserted,

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293. *Id.* at 814 (quoting *United States v. Muniz*, 374 U.S. 150, 163 (1963)).

294. *Id.* at 810 (emphasis supplied in *Varig*) (quoting H.R. REP. NO. 2245, 77th Cong., 2d Sess. 1, 8 (1942)).

295. *Id.* at 814.

296. *Id.* at 811-12.

297. *Id.* at 808.

298. *Id.* at 813.

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*



Decisions as to the manner of enforcing regulations directly affect the feasibility and practicality of the government's regulatory program; such decisions require the agency to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding. . . . Judicial intervention in such decisionmaking through private tort suits would require the courts to "second-guess" the political, social, and economic judgments of an agency exercising its regulatory function. It was precisely this sort of judicial intervention in policy making that the discretionary function exception was designed to prevent.<sup>303</sup>

Thus, in *Varig*, the FAA's determination of how to supervise the safety procedures of airplane manufacturers was the exercise of discretionary authority of the "most basic kind," and was thus protected by governmental immunity.<sup>304</sup>

#### E. Berkovitz and the Restriction of Dalehite

Following *Varig*, the scope of the discretionary function exception was unclear. Some courts adopted a narrow reading of the exception, reasoning that all decisions made by government employees involve some element of discretion, and that a broad interpretation would virtually swallow the waiver of immunity—a result Congress could not have intended.<sup>305</sup> Other courts adopted a broad reading of the exception on the theory that waivers of immunity are strictly construed in favor of the sovereign and that exceptions to such waivers should accordingly receive a generous construction.<sup>306</sup>

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303. *Id.* at 819-20.

304. *Id.* at 820.

305. *See, e.g., Alabama Elec. Coop. v. United States*, 769 F.2d 1523, 1530-31 (11th Cir. 1985) (rejecting a broad application of the exception and holding that the discretionary function exception does not *per se* insulate the government from liability for negligent design of a flood control project).

*Alabama Electric* is, however, something of an anomaly among post-*Varig* cases. *See Aslakson v. United States*, 790 F.2d 688, 693 (8th Cir. 1986) ("Where the challenged governmental activity involves safety considerations under an established policy rather than the balancing of competing public policy considerations, the rationale for the exception falls away and the United States will be held responsible for the negligence of its employees."); *see also Fishback & Killefer, Discretionary Function*, *supra* note 285, at 319-21 (criticizing *Alabama Electric* approach as based on an "incorrect" underlying premise that scientific or technical decisions do not implicate policy concerns and noting that the case is "almost certainly inconsistent with the thrust of other post-*Varig* cases").

306. *See, e.g., General Pub. Utils. Corp. v. United States*, 745 F.2d 239, 248 (3d Cir. 1984) (holding that negligent design claim involving the Three Mile Island nuclear power facility was barred by the discretionary function exception), *cert. denied*, 469 U.S. 1228 (1985); *George v. United States*, 703 F.2d 90, 92 (4th Cir. 1983) (barring plaintiffs' claims that the government's failure to prohibit use of fuel system, made of two different metals, in aircraft resulted in system rusting and causing crash). *See generally* Comment, *The Discretionary Function Exception and Mandatory Regula-*

In analyzing the discretionary function exception, some courts considered a number of factors, including the existence of objective standards against which to judge the conduct,<sup>307</sup> the extent to which the conduct involves public policy considerations,<sup>308</sup> the extent to which a waiver of liability would affect government programming, and the extent to which such a waiver would involve courts in political, economic, and social decisions.<sup>309</sup> The weight given these factors was determined on a case-by-case basis and many of the decisions appeared outcome oriented.

Recently, the Supreme Court went a long way toward clarifying the scope of the discretionary function exception in *Berkovitz v. United States*.<sup>310</sup> *Berkovitz* involved allegations that the Bureau of Biologics of the Food and Drug Administration (FDA) wrongfully released to the public a contaminated polio vaccine lot, and that the National Institute of Health's Division of Biologic Standards (DBS) acted wrongfully in licensing the manufacturer of the vaccine. These acts of negligence allegedly resulted in a three-month-old infant contracting a severe case of polio that left the child almost completely paralyzed and unable to breathe without a respirator.<sup>311</sup>

In *Berkovitz*, the Court began its inquiry into the applicability of the discretionary function exception by examining the nature of the conduct at issue, *not* the status of the actor.<sup>312</sup> Thus, the actor's membership in the executive branch of government, for example, had no bearing on the existence of the exception. The Court then created a two-part analysis to determine whether a government employee's conduct is discretionary. First, a court must consider whether the conduct at issue involves a matter of judgment or choice. If there is no choice involved—if a federal statute, regulation or policy specifically prescribes a course of action which the employee failed to follow—the discretionary function exception will not apply and the analysis ends.<sup>313</sup> If the challenged conduct involves some element of choice, then the court passes to the second part of the analysis and determines whether the choice or judgment represents a decision based on considerations of public policy.<sup>314</sup> If so, the government is immune from suit; if not, there will be no bar to government liability. "In sum, the discretionary function exception insulates the gov-

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tions, 54 U. CHI. L. REV. 1300, 1320-23 (1987); Fishback & Killefer, *Discretionary Function*, *supra* note 285, at 298-300, 303-21.

307. See *Driscoll v. United States*, 525 F.2d 136, 138 (9th Cir. 1975) (citing Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 219 (1963)).

308. *Id.*

309. *Id.*

310. 486 U.S. 531 (1988).

311. *Id.* at 583.

312. *Id.* at 536 (citing *United States v. S.A. Empresa De Viaca Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984)).

313. *Id.*

314. *Id.* at 537 (quoting *Dalehite v. United States*, 346 U.S. 15, 36 (1953)) ("Where there is room for policy judgment and decision there is discretion.").

ernment from liability if the action challenged in the case involves the permissible exercise of policy judgment."<sup>315</sup>

The foregoing analysis resulted in a unanimous decision in favor of the plaintiffs in *Berkovitz*, and thus in a conclusion that the discretionary function exception did not apply.<sup>316</sup> FDA regulations empowered, but did not require, the FDA to examine and prevent the distribution of non-complying lots of the vaccine. Plaintiffs alleged that under the authority of these regulations, the FDA adopted a policy of testing *all* lots for compliance with safety standards, and that notwithstanding this policy, the FDA failed to test the lot in question and released it for public consumption. The Court held that the discretionary function exception did not bar a claim based upon the failure of FDA officials to test the lot in question, since FDA policy required the testing and left officials with no matter of choice or judgment.<sup>317</sup>

Similarly, the Court held that the discretionary function exception did not bar that portion of the claim based upon the decision to license the manufacturer. The plaintiffs alleged that DBS issued the license without receiving test data required by statutes and regulations as a precondition to licensure. Under these circumstances, the statutory framework provided no room for choice or judgment and the discretionary function exception did not apply.<sup>318</sup>

*Berkovitz* restricted the *Varig* expansion of the discretionary function exception. In "restating and clarifying" the exception's scope, the Court "specifically . . . reject[ed] the government's argument that the exception precludes liability for any and all acts arising out of the regulatory programs of federal agencies."<sup>319</sup> In quashing the government's attempt to further expand the exception to immunize all governmental regulatory activity per se, the Court narrowed its previous interpretation of the language and legislative history of the exception.<sup>320</sup> The Court also relied on its prior decisions in *Indian Towing* and *Rayonier* in rejecting immunity for "core" or "uniquely governmental functions."<sup>321</sup>

#### F. *Post-Berkovitz: Toward a Narrower Reading of "Discretionary Function"*

The *Berkovitz* narrowing of the discretionary function exception and the resurrection of *Indian Towing* suggest a limitation of *Varig* princi-

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315. *Id.*

316. *Id.* at 544-45.

317. *Id.* at 544 ("When a suit charges an agency with failing to act in accord with a specific mandatory directive, the discretionary function exception does not apply.").

318. *Id.* at 542-44.

319. *Id.* at 538 ("To the extent we have not already put the Government's argument to rest, we do so now. The discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment."). *Id.* at 539.

320. *Id.* at 538-39.

321. *Id.* at 539 n.5.

ples, as illustrated by post-*Berkovitz* cases.<sup>322</sup> In *McMichael v. United States*,<sup>323</sup> for example, claims were filed against the United States under the FTCA seeking damages for injuries and deaths resulting from a munitions plant explosion which occurred during an electrical storm. The plant's safety regulations required that the plant be evacuated during electrical storms.<sup>324</sup> The district court found that the government was negligent in failing to enforce the safety standards of the plant, and held that the discretionary function exception did not bar the plaintiff's claim.<sup>325</sup> Applying *Berkovitz*, the Eighth Circuit affirmed the lower court's decision, holding that the government inspectors did not exercise discretion since evacuating the plant was mandated by safety regulations.<sup>326</sup>

The Tenth Circuit reached a similar conclusion in *Ayala v. Joy Manufacturing Company*.<sup>327</sup> In *Ayala*, plaintiffs brought wrongful death suits against the government for negligent inspection of a continuous coal mining machine which caused a methane and coal dust explosion in a Colorado coal mine. The district court, relying on *Varig*, held that the regulatory inspection came under the discretionary function exception and dismissed the action.<sup>328</sup> On appeal, the Tenth Circuit, citing *Berkovitz* and *McMichael*, reversed the district court's decision, and held that the conduct of the government mining inspector "involved no discretion or policy making choices."<sup>329</sup>

### G. Conclusion

The holdings in *Berkovitz*, *McMichael* and *Ayala* suggest a move away from *Varig*'s unwarranted expansion of the discretionary function exception and clearly provide a better framework for analysis of this exception in the future.<sup>330</sup> While there remains some confusion over the scope of the discretionary function exception,<sup>331</sup> the Supreme Court ap-

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322. See, e.g., *Ayala v. Joy Mfg. Co.*, 877 F.2d 846 (10th Cir. 1989); *McMichael v. United States*, 856 F.2d 1026 (8th Cir. 1988). Cf. *Patterson v. United States*, 856 F.2d 670 (1988) (holding that an alleged negligent inspection of a fire site by officials from the Office of Surface Mining was not within the discretionary function exception), *vacated*, 881 F.2d 127 (4th Cir. 1989) (en banc) (reinstating the district court's decision to dismiss the FTCA claim).

323. 856 F.2d 1026 (8th Cir. 1988).

324. *Id.* at 1030.

325. *Id.* at 1030-31.

326. *Id.* at 1033. "[T]he particular violation at issue here did not involve the weighing of any facts or policies and was therefore not discretionary." *Id.* at 1033-34 n.8 (citing *Berkovitz v. United States*, 486 U.S. 531 (1988)).

327. 877 F.2d 846 (10th Cir. 1989).

328. *Id.* at 848.

329. *Id.* at 848-49.

330. See *supra* notes 305-329 and accompanying text.

331. For example, see *Patterson v. United States*, 856 F.2d 670 (1988), *vacated*, 881 F.2d 127 (4th Cir. 1989) (en banc). In *Patterson*, residents of a house built on a subterranean coal refuse pile were injured or killed after inhaling smoke and noxious gases when an above-ground fire ignited the refuse pile below. One year before their inju-

pears to be trimming back its previous expansion of the exception in accord with Congress' purpose in enacting both the FTCA and its exceptions. Other courts should follow the Court's analysis and bar only those claims where the negligent governmental acts involve actual public policy considerations.

## VI. SUMMARY

Although the FTCA undoubtedly provided and continues to provide much needed relief to countless individuals, numerous claims still go without adequate remedy because the FTCA immunity waiver is only partial. Judicial expansion of explicit exceptions, and the judicial crea-

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ries, the plaintiffs had complained of the problem to the Federal Office of Surface Mining (OSM). An OSM inspector had visited the site but no action was taken. The plaintiffs alleged that their injuries were caused by the negligent OSM inspections. *Patterson*, 856 F.2d at 671. The government responded that the acts of the OSM field investigator were "discretionary" and thus protected by section 2680(a).

A three-member panel of the Fourth Circuit disagreed. While acknowledging that the inspector's investigation "inevitably require[s] some decision-making," the court concluded that the type of discretion is not of the nature and quality to trigger the exception. *Id.* at 674. Specifically, the court found that field investigators do not have the authority to make policy decisions or even recommendations as to final disposition of the complaint. Thus, because the inspector's acts were not discretionary, the exception did not apply. *Id.* This was true even though the plaintiffs did not allege that the inspector had disregarded specific and mandatory inspection guidelines, as in *Berkovitz v. United States*, 486 U.S. 531 (1988), or that OSM acted negligently in finding that no emergency situation warranting the expenditure of funds existed. *Patterson*, 856 F.2d at 671, 674. The court, relying on the Supreme Court's recent narrowing of the discretionary function in *Berkovitz*, specifically rejected the *Dalehite* operation/planning distinction as "either too simplistic or too complicated and specious." *Id.* at 673. The court seemed comfortable waiving immunity for low-level negligence, but hesitant to waive immunity for "high-altitude" decisions.

On rehearing, however, after considering the evidence presented on re-examination, the Fourth Circuit, en banc, found that the OSM's final decision that no emergency existed which warranted the expenditure of emergency funds was a discretionary one. *Patterson*, 881 F.2d at 128. In vacating the panel opinion, the court did not address the issues raised by *Berkovitz*. The court's reasoning, while difficult to determine, appears to be based on a factual finding from the record, and should not be construed as a retreat from *Berkovitz* principles. See also *Piechowicz v. United States*, 885 F.2d 1207 (4th Cir. 1989).

In *Piechowicz*, two would-be witnesses in a criminal trial were murdered after receiving threats not to testify. The witnesses had reported the threats to the Assistant U.S. Attorney and the DEA agent in charge of the case, but neither official had offered the witnesses protection. The plaintiffs sued the government and the two officials for failing to place the witnesses in the Witness Security Program. *Id.* at 1210.

The Fourth Circuit held that federal witness protection statutes and regulations grant agents in charge of a case "considerable latitude to decide whether and how to protect witnesses." *Id.* at 1212. The decision whether to offer witnesses federal protection was a matter of choice and discretion "involving the permissible exercise" of public policy considerations. *Id.* at 1211 (quoting *Berkovitz v. United States*, 486 U.S. 531, 539 (1988)). Therefore, the officials' failure to provide protection passed both parts of the *Berkovitz* test, and triggered application of the discretionary function exception. See *supra* notes 310-315 and accompanying text.

tion of others, have led to a reservation of immunity far beyond that originally intended by Congress. In some situations, courts have enlarged exceptions to the point where the rule has been swallowed and the waiver of immunity rendered meaningless. Judicial restraint in interpreting the exceptions should be encouraged and Congress should recognize and remedy overbroad judicial construction by amendment and clearer statutory definitions.

Thoughtful counsel must remain aware of the government's reserved immunity and should attempt to couch claims in language falling within the waiver of immunity, rather than within a reservation. For example, claims for injuries sustained in an assault or battery at the hands of a government employee should be framed in terms of his superiors' negligence in hiring, supervising and training him, and where the government has a duty to control the wrongdoer's conduct independent of the employment relationship, this should be stated. Similarly, cases impacted by the foreign country exception should focus on those negligent acts or omissions which occurred in the United States and be framed as "headquarters claims." *Feres* claims should be pleaded so as to make clear that no challenge to military discipline is intended. And all claims, where possible, should avoid challenge to governmental policy decisions and should instead focus on actions or failures to act that are violative of established policies and procedures.

Counsel also must be aware of the varied treatment accorded the reservations of immunity by the various circuits and should make every effort to present claims in the most favorable forum. For example, the Fourth Circuit has proved unreceptive to narrow constructions of the *Feres* doctrine and the intentional tort and discretionary function exceptions, while the Eighth, Ninth and Tenth Circuits have taken the opposite tact. Finally, counsel must be aware that administrative remedies may be available for meritorious claims, even where suit is barred by the doctrine of sovereign immunity. Benefits available under the Veterans' Benefits Act, the Military Claims Act, the Foreign Claims Act, and similar statutes sometimes provide meaningful administrative remedies where none exist at law.